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Report to the Nebraska Supreme Court on
Indigent Defense Systems and Fee Structures



Nebraska Minority Justice Committee
Summer 2006

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INTRODUCTION

On May 18, 2005 the Nebraska Supreme Court adopted the following resolution: “The Minority and Justice Implementation Committee shall study indigency attorney fee structures statewide and report and make recommendations, if any, to the Supreme Court regarding indigency fees throughout the State of Nebraska.”

The Nebraska Supreme Court’s resolution was influenced by a certain county’s attempt to establish a flat fee for court appointed attorneys. The legal profession’s concern with this policy is that such a drastic rate reduction would likely encourage attorneys to spend less time on court appointed cases, and discourage more experienced attorneys from accepting court appointments in the first place, thereby reducing the overall quality of indigent defense provided in the state. This instance raised questions about the fairness of the current funding structures used across the state. In response, the Nebraska Supreme Court charged the Minority and Justice Implementation Committee¹ with studying the fee structure system on a statewide basis. The Minority and Justice Implementation Committee appointed an ad-hoc “Standards Committee” to accomplish the resolution. The Standards Committee consists of representatives from the Minority and Justice Implementation Committee and the Nebraska Commission on Public Advocacy, public defenders, criminal defense attorneys, and several County Commissioners.

The Standards Committee expanded its scope to assess fee structures, compensation procedures, appointment procedures, quality of representation, and additional issues related to indigent defense raised by Nebraska’s judges, defense attorneys and county commissioners. The scope was expanded because the Committee believed that recommendations concerning the fee structure of one system may inadvertently cause counties to switch to an alternate system of indigent defense. For example, if the fees for assigned counsel were raised, it may cause a county to solicit a low-bid contract for indigent defense. If guidelines were not in place to ensure the quality of indigent defense contracts, then the concern of providing quality indigent defense would simply be placed on a different system, rather than resolved.

The findings presented in this report, coupled with existing national guidelines for indigent defense systems, are the basis for the Committee’s recommendations regarding the qualifications, compensation, training, caseloads and workloads for each type of indigent defense system in Nebraska.

¹ The Nebraska Minority and Justice Implementation Committee is a joint initiative of the Nebraska Supreme Court and the Nebraska State Bar Association, established to examine and address issues and perceptions of racial and ethnic bias in the justice system and legal profession.

METHODS

The Committee developed and administered four surveys, collecting data from district, county, and juvenile court judges, attorneys who accept court appointments in felony and misdemeanor cases, and County Commissioners. The surveys include a number of previously piloted questions from national survey instruments as well as questions specific to assessing Nebraska's indigent defense systems.

The overall response rate for district court judges was 92.7%, the response rate for county court judges was 86.2%, and the response rate for separate juvenile court judges was 80.0%.² Unfortunately, a master list of all attorneys who accept court appointments in felony and misdemeanor cases is not maintained. Researchers, therefore, compiled their own list via several methods. All attorneys who, according to Nebraska State Bar Association records, list criminal practice as their specialty were included on the list (public defenders and county attorneys were removed). Additionally, each judge was asked to provide a list of attorneys that they appoint in felony and misdemeanor cases. The names from these lists were added to the master list. Duplicate names were removed. A total of 840 surveys were mailed to attorneys, 177 were returned yielding a 21% response rate.³

In an attempt to obtain additional information regarding the funding of indigent defense systems, a brief survey of County Commissioners was developed by the Standards Committee and administered electronically by the Nebraska Association of County Officials (NACO). Fifty-seven (57) of 93 counties responded, yielding a 61.3% response rate. In addition to the data gleaned from the survey instrument, in-depth interviews were conducted with several County Commissioners for a deeper understanding of budgetary considerations and opinions on alternate funding strategies.

² The judges' response rate was excellent, especially considering that legal professionals in general, typically yield lower response rates to surveys than the general population (Clark and Kiminski, 1990).

FINDINGS

INDIGENT DEFENSE SYSTEMS IN NEBRASKA

Type of Indigent Defense System by County

Judges were asked to indicate which type of indigent defense system is *primarily* used in the counties in which they preside. Responses were collapsed into three main categories: an assigned counsel system, an elected public defender program, and a contract defender program (see Table 1).

Table 1: Primary Indigent Defense System by County

| County | System | Population |
|------------------|---------------|-------------------|
| Adams County | EPD | 31,151 |
| Antelope County | CPD | 7,452 |
| Arthur County | AC | 444 |
| Banner County | AC | 819 |
| Blaine County | AC | 583 |
| Boone County | CPD | 6,259 |
| Box Butte County | EPD | 12,158 |
| Boyd County | AC | 2,438 |
| Brown County | AC | 3,525 |
| Buffalo County | EPD | 42,259 |
| Burt County | AC | 7,791 |
| Butler County | CPD | 8,767 |
| Cass County | EPD | 24,334 |
| Cedar County | AC | 9,615 |
| Chase County | AC | 4,068 |
| Cherry County | AC | 6,148 |
| Cheyenne County | AC | 9,830 |
| Clay County | CPD | 7,039 |
| Colfax County | CPD | 10,441 |
| Cuming County | AC | 10,203 |
| Custer County | CPD | 11,793 |
| Dakota County | EPD | 20,253 |
| Dawes County | EPD | 9,060 |
| Dawson County | EPD | 24,365 |
| Deuel County | AC | 2,098 |
| Dixon County | AC | 6,339 |
| Dodge County | AC | 36,160 |
| Douglas County | EPD | 463,585 |
| Dundy County | CPD | 2,292 |
| Fillmore County | EPD | 6,634 |
| Franklin County | AC | 3,574 |
| Frontier County | AC | 3,099 |
| Furnas County | AC | 5,324 |
| Gage County | CPD | 22,993 |
| Garden County | AC | 2,292 |
| Garfield County | AC | 1,902 |
| Gosper County | AC | 2,143 |
| Grant County | AC | 747 |
| Greeley County | AC | 2,714 |
| Hall County | EPD | 53,534 |

| |
|--|
| EPD= Elected Public Defender CD= Contract Defender AC= Assigned Counsel System |
|--|

| | | |
|---------------------|-----|---------|
| Harlan County | AC | 3,786 |
| Hayes County | AC | 1,068 |
| Hitchcock County | CPD | 3,111 |
| Holt County | EPD | 11,551 |
| Hooker County | AC | 783 |
| Howard County | AC | 6,567 |
| Jefferson County | CPD | 8,333 |
| Johnson County | CPD | 4,488 |
| Kearney County | EPD | 6,882 |
| Keith County | CPD | 8,875 |
| Keya Paha County | AC | 983 |
| Kimball County | AC | 4,089 |
| Knox County | CPD | 9,374 |
| Lancaster County | EPD | 250,291 |
| Lincoln County | EPD | 34,632 |
| Logan County | AC | 774 |
| Loup County | AC | 712 |
| Madison County | EPD | 35,226 |
| McPherson County | AC | 533 |
| Merrick County | AC | 8,204 |
| Morrill County | AC | 5440 |
| Nance County | AC | 4,038 |
| Nemaha County | AC | 7,576 |
| Nuckolls County | AC | 5,057 |
| Otoe County | EPD | 15,396 |
| Pawnee County | AC | 3,087 |
| Perkins County | AC | 3,200 |
| Phelps County | EPD | 9,747 |
| Pierce County | CPD | 7,857 |
| Platte County | EPD | 31,662 |
| Polk County | AC | 5,639 |
| Red Willow County | CPD | 11,448 |
| Richardson County | CPD | 9,531 |
| Rock County | AC | 1,756 |
| Saline County | CPD | 13,843 |
| Sarpy County | EPD | 122,595 |
| Saunders County | EPD | 19,830 |
| Scotts Bluff County | EPD | 36,951 |
| Seward County | EPD | 16,496 |
| Sheridan County | EPD | 6,198 |
| Sherman County | AC | 3,318 |
| Sioux County | AC | 1,475 |
| Stanton County | AC | 6,455 |
| Thayer County | CPD | 6,055 |
| Thomas County | AC | 729 |
| Thurston County | AC | 7,171 |
| Valley County | AC | 4,647 |
| Washington County | AC | 18,780 |
| Wayne County | AC | 9,851 |
| Webster County | AC | 4,061 |
| Wheeler County | AC | 886 |
| York County | EPD | 14,598 |

EPD= Elected Public Defender
CD= Contract Defender
AC= Assigned Counsel System

Although Neb. Rev. Stat. §23-3401 requires counties with populations of more than 100,000 to have public defender offices, population alone does not predict the type of system used by a county. Elected public defender systems are used in 24 counties with populations ranging from 6,198 to 463,585. Contract defender systems are used in 18 counties with populations ranging from 2,292 to 22,993 and assigned counsel systems are used in 51 counties with populations ranging from 444 to 36,160.

When compared to a 1992 study of Nebraska's indigent defense systems (The Spangenberg Group, 1993), data indicate that over the past 14 years there has been an increase in the number of contract defender programs (14% increase) and elected public defender programs (2% increase) and a decrease in the number of assigned counsel programs (16% decrease) (see Table 2).

Table 2: Comparison of Primary Indigent Defense Systems

| Primary System | 2006 | | 1992 | |
|--------------------------|--------|---------|--------|---------|
| | Number | Percent | Number | Percent |
| Assigned Counsel | 51 | 55% | 66 | 71% |
| Elected Public Defender | 24 | 26% | 22 | 24% |
| Contract Public Defender | 18 | 19% | 5 | 5% |
| Total | 93 | 100% | 93 | 100% |

What percentage of all defendants or parties in your courts have court-appointed counsel in the following types of cases?

District court judges indicate that court appointed counsel is appointed “most of the time” in capital felonies (77.3%), other felonies (54.2%), county court case appeals (41.9%), and felony appeals (65.9%) (see Table 3).

Table 3: Percentage of All Defendants/Parties in District Courts who have Court-Appointed Counsel

| All Districts | District Court Judges | | | |
|----------------------------------|-----------------------|------------------|-------------------|-------------------------|
| | <u>Occasionally</u> | <u>Sometimes</u> | <u>Frequently</u> | <u>Most of the Time</u> |
| Capital Felony (n=44) | 13.6% | 2.3% | 6.8% | 77.3% |
| Other Felony (n=48) | 16.7% | 2.1% | 27.1% | 54.2% |
| County Court Case Appeals (n=43) | 16.3% | 25.6% | 16.3% | 41.9% |
| Felony Court Case Appeals (n=43) | 4.9% | 7.3% | 22.0% | 65.9% |

Similarly, in county court a large percentage of judges indicate that court appointed counsel is appointed “most of the time” in capital felonies (71.9%), other felonies (45.2%), and felony appeals (68.8%) As opposed to misdemeanor offenses, these more serious offenses carry the possibility of much more significant penalties and the costs of privately retained counsel is much greater. Defendants are, therefore, more likely to receive court appointed counsel. County and juvenile court judges were also asked to indicate the percentage of defendants or parties that have court appointed counsel in juvenile cases. (District court judges were not asked to comment on these types of cases as they seldom handle juvenile cases). Data indicate that juvenile abuse/neglect cases are substantially more likely to receive court appointed counsel than are juvenile law violations or status offenses (see table 4).

Table 4: Percentage of All Defendants/ Parties in County and Juvenile Courts who have Court-Appointed Counsel

| | <u>County and Juvenile Court Judges</u> | | | |
|--|---|------------------|-------------------|-------------------------|
| | <u>Occasionally</u> | <u>Sometimes</u> | <u>Frequently</u> | <u>Most of the Time</u> |
| Capital Felony (n=32) | 3.1% | 9.4% | 15.6% | 71.9% |
| Other Felony (n=42) | 7.1% | 7.1% | 40.5% | 45.2% |
| Felony Appeals (n=16) | 18.8% | 6.3% | 6.3% | 68.8% |
| Misdemeanors/Ordinance Violations (n=46) | 32.6% | 45.7% | 17.4% | 4.3% |
| Juvenile Law Violations (n=16) | 23.8% | 33.3% | 23.8% | 19.0% |
| Juvenile Status (n=41) | 14.6% | 54.4% | 22.0% | 39.0% |
| Juvenile Abuse/Neglect (43) | 2.3% | 4.7% | 14.0% | 79.1% |

SYSTEM OF ASSIGNING COUNSEL

Do your courts maintain lists of attorneys willing and/or able to be assigned to indigent defendants?

Over sixty percent (62.6%) of judges report that their court maintains a list of attorneys willing to be assigned to indigent defendants. County and juvenile court judges (77.2%), however, are significantly more likely to report using a list than are district court judges (46%).

Table 5: Does your court maintain a list of attorneys willing to be assigned to indigent defendants?

| | District Court Judges | | County and Juvenile Court Judges | | Total |
|--------------------------|-----------------------|-------|----------------------------------|-------|-------|
| Maintains a List | 23 | 46.0% | 44 | 77.2% | 62.6% |
| Does Not Maintain a List | 27 | 54.0% | 13 | 22.8% | 37.4% |
| Total | 50 | 100% | 57 | 100% | 100% |

Judges indicating that a list is not used were asked to explain how attorneys in their courts are assigned to cases. District court judges either indicate that because the majority of appointments are made in county court, they seldom need to assign counsel and therefore they do not maintain a formal list, or they indicate that they are familiar with the lawyers in their community and simply base appointments on the nature or complexity of the case and the experience/expertise of the attorney. County and juvenile court judges who do not maintain a list also explain that they know who the attorneys in their county are who are willing to take appointments. Of the 20 district court judges who indicate using a list, only five share a list with county court. Joint lists are more likely between county and juvenile court (with the exception of separate juvenile court judges who do not utilize joint lists).

On what basis are assigned counsel appointments made?

District, county and juvenile court judges were asked to identify on what basis they make assigned counsel appointments: rotation, case type, and/or experience of the attorney. The American Bar Association's *Standards for Providing Defense Services* recommends that,

As nearly as possible, assignments should be made in an orderly way to avoid patronage and its appearance, and to assure fair distribution of assignments among all whose names appear on the roster of eligible lawyers. Ordinarily, assignments should be made in the sequence that the names appear on the roster of eligible lawyers. Where the nature of the charges or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence (Standard 5-2.3).

Results indicate that over one-quarter of Nebraska judges base appointments solely on rotation (28.6%), and another quarter (25.5%) base appointments on a combination of rotation, case type and the experience level of the attorney (see Table 6).

Table 6: Basis for Assigned Counsel Appointments

| <u>Basis for Assigned Counsel Appointments</u> | District Court Judges | | County & Juvenile Judges | | Total |
|--|-----------------------|---------|--------------------------|---------|---------|
| | Number | Percent | Number | Percent | Percent |
| Solely on rotation | 10 | 23.8% | 18 | 32.1% | 28.6% |
| Solely on case type | 1 | 2.4% | 1 | 1.8% | 2.0% |
| Solely on experience level of attorney | 6 | 14.3% | 4 | 7.1% | 10.2% |
| Rotation and case type | 1 | 2.4% | 4 | 7.1% | 5.1% |
| Rotation and experience level of attorney | 7 | 16.7% | 5 | 8.9% | 12.2% |
| Case type and experience level of attorney | 10 | 23.8% | 6 | 10.7% | 16.3% |
| Rotation, case type, and experience level | 7 | 16.7% | 18 | 32.1% | 25.5% |
| Total | 42 | 100% | 56 | 100% | 100% |

While ABA standards recommend that case type and experience be taken into consideration when making court appointments, it may be problematic that some judges appear not to use any type of rotation system, as attorneys may perceive that judges are “playing favorites”. Qualitative comments support this suggestion. For example, in a county where a list and open rotation system are not used, one district court judge suggests, “If I were an attorney I would see it as a hidden, secret system. I do know that other judges have ‘paid attorneys back’ for too many trials or other offenses by not appointing them again.” A county court judge also commented on the issue, “There seems to be some dissatisfaction among the attorneys appointed regarding how appointments are made such as a feeling [that] some attorneys get more appointments. Maybe we could make sure a rotation system is followed.”

Attorneys were also asked to explain their perception of how appointments are made. The general perception is that judges appoint from a list of attorneys on a rotating basis. However, some attorneys believe that judges appoint simply by personal preference and a substantial percentage of attorneys indicate that they do not know how judges make assignments. Over 20% of attorneys responding to the survey provided comments indicating the perception of patronage and/or calling for a more objective process. “My experience in several counties is that the appointments are not made on an even basis. Some attorneys, for whatever reason, receive more or less appointments than others.”

What is the primary method used in your jurisdiction for appointing private attorneys in felony cases?

Across the state, the primary method for appointing private attorneys in felony cases is by county court judges either from a list of attorneys (63.2%) or without a list (18.9%). District court judges are much less likely to appoint counsel in felony cases. The reason for this is because the majority of felony cases begin in county court (where counsel is assigned by county court judges) and are later bound over to district court. In a few counties, appointments to felony cases are made by clerk magistrates (2.1%).

Table 7: Primary Method of Appointment in Felony Cases

| <u>Primary Method of Appointing in Felony Cases</u> | District Court Judges | | County and Juvenile Judges | | Total |
|---|-----------------------|---------|----------------------------|---------|---------|
| | Number | Percent | Number | Percent | Percent |
| County Court Judge from a list | 24 | 52.2% | 36 | 73.5% | 63.2% |
| County Court Judge, no list used | 7 | 15.2% | 11 | 22.4% | 18.9% |
| District Court Judge from a list | 4 | 8.7% | 0 | 0.0% | 4.2% |
| District Court Judge no list used | 11 | 23.9% | 0 | 0.0% | 11.6% |
| Clerk magistrate from a list | 0 | 0.0% | 2 | 4.1% | 2.1% |
| Total | 46 | 100% | 49 | 100% | 100% |

What is the primary method used in your jurisdiction for appointing private attorneys in misdemeanor cases?

Across the state, the primary method for appointing private attorneys in misdemeanor cases is by county court judges from a list of attorneys (70.1%), or by the county court judge without the assistance of a formal list (24.4%). In a few counties, appointments are made by district court judges (3.6%) or clerk magistrates (1.2%).

Table 8: Primary Method of Appointing in Misdemeanor Cases

| <u>Primary Method of Appointing in Misdemeanor Cases</u> | District Court | | County & Juvenile Court | | Total |
|--|----------------|---------|-------------------------|---------|---------|
| | Number | Percent | Number | Percent | Percent |
| County Court Judge from a list | 21 | 65.6% | 37 | 74.0% | 70.1% |
| County Court Judge, no list used | 8 | 25.0% | 12 | 24.0% | 24.4% |
| District Court Judge from a list | 2 | 6.3% | 0 | 0.0% | 2.4% |
| District Court Judge no list used | 1 | 3.1% | 0 | 0.0% | 1.2% |
| Clerk Magistrate from a list | 0 | 0.0% | 1 | 2.0% | 1.2% |
| Total | 32 | 100% | 50 | 100% | 100% |

What is the primary method used in your jurisdiction for appointing private attorneys in juvenile cases?

Across the state, the primary method for appointing private attorneys in juvenile cases is by the county/juvenile court judges from a list of attorneys (77.3%), or by the county/juvenile court judge without the assistance of a formal list (15.9%).

Appointments are occasionally made by clerk magistrates, either with the assistance of a formal list (2.3%) or not (4.5%).

Table 9: Primary Method of Appointing in Juvenile Cases

| <u>Primary Method of Appointing in Misdemeanor Cases</u> | County & Juvenile Court | |
|--|-------------------------|---------|
| | Number | Percent |
| County/Juvenile Court Judge, from a list of attorneys | 34 | 77.3% |
| County/Juvenile Court Judge, no list used | 7 | 15.9% |
| Other personnel from a list of attorneys | 1 | 2.3% |
| Other personnel, no list used | 2 | 4.5% |
| Total | 44 | 100% |

How does a lawyer become included on a list?

Judges were asked to indicate how a lawyer comes to be included on the list, or considered for appointment if a formal list is not used.

Table 10: How Do Lawyers Become Included on the List?

| <u>How Lawyers Become Included on the List</u> | <u>District Court</u> | | <u>County & Juv. Court</u> | | Total |
|---|-----------------------|---------|--------------------------------|---------|-------|
| | Number | Percent | Number | Percent | |
| All lawyers in county are included | 10 | 22.7% | 9 | 17.0% | 19.6% |
| Lawyer requests to be appointed | 19 | 43.2% | 27 | 50.9% | 47.4% |
| Lawyer requests to be appointed and is determined qualified by administering personnel | 10 | 22.7% | 10 | 18.9% | 20.6% |
| Lawyer requests to be appointed and is physically present in court room | 3 | 6.8% | 7 | 13.2% | 10.3% |
| All lawyers in the county are included and the lawyer is physically present in the court room | 2 | 4.5% | 0 | 0.0% | 2.1% |
| Total | 44 | 100% | 53 | 100% | 100% |

While nearly one-fifth of judges (19.6%) indicate that all lawyers in the county are included on the list, nearly half of all judges (47.4%) indicate that lawyers must request to be appointed. Twenty point six percent (20.6%) of judges indicate that not only must lawyers request to be appointed, they must also be determined qualified by administering personnel. It may be problematic that some judges report assigning counsel based in-part on their physical presence in the court room. The American Bar Association's *Standards for Providing Defense Services* states,

Except where there is a need for an immediate assignment for temporary representation, assignments should not be made to lawyers merely because they happen to be present in court at the time the assignment is made (Standard 5-2.1).

The process for compiling the list also differs by jurisdiction. In some jurisdictions judges will contact attorneys concerning their willingness to accept court appointments. In other jurisdictions attorneys request court appointments by making contact with the judge or clerk's office, and in other jurisdictions every attorney in the county is automatically included on the list.

What qualifications must an attorney have to get on the list?

Beyond bar membership and some experience it appears that there are no "formal" qualifications to be placed on the list or be considered for court appointments. Over 40% (43.0%) of judges simply indicate that the attorney must be a member of the Nebraska State Bar Association.⁴ Over one-third (36.6%) indicate that the lawyer must not only be a member of the NSBA but must also have a certain amount of criminal trial experience.

⁴ The Nebraska State Bar Association is a mandatory bar, therefore every practicing attorney in the state is a member of the NSBA.

Table 11: What Qualifications Must an Attorney Have to Be Considered for Appointment?

| <u>Qualifications attorneys must have to be eligible for appointment</u> | <u>District Court</u> | | <u>County and Juv.</u> | | Total |
|--|-----------------------|---------|------------------------|---------|-------|
| | Number | Percent | Number | Percent | |
| Be a member of the Nebraska State Bar Association | 17 | 40.5% | 23 | 45.1% | 43.0% |
| Be a member of the local bar association | 2 | 4.8% | 0 | 0.0% | 2.2% |
| Have a specific amount of criminal trial experience | 4 | 9.5% | 3 | 5.9% | 7.5% |
| NSBA member and local bar member | 1 | 2.4% | 2 | 3.9% | 3.2% |
| NBSA member and certain amount of criminal trial experience | 15 | 35.7% | 19 | 37.3% | 36.6% |
| NSBA & local bar member with criminal trial experience | 3 | 7.1% | 4 | 7.8% | 7.5% |
| Total | 44 | 100% | 55 | 100% | 100% |

The American Bar Association's *Standards for Providing Defense Services* recommends that, "Each jurisdiction should adopt specific qualification standards for attorney eligibility, and the private bar should be encouraged to become qualified pursuant to such standards" (Standard 5-2.2). It does not appear that this is taking place in Nebraska. However, a few judges posit that by passing the Nebraska State Bar exam, each attorney demonstrates that they are qualified.

When attorneys were asked what qualifications are needed to get on the list to be considered for court appointment, the overwhelming majority listed membership in the Nebraska State Bar Association as the only necessary qualification. Several attorneys also cited experience in criminal law as a qualification.

It appears that the lists are not kept up to date. According to Nebraska State Bar Association records, over one-tenth of the attorneys listed on judges' court appointment lists were either deceased or disbarred.

Are there special provisions for selecting attorneys to handle more complex, serious, or special cases, such as capital cases in your courts?

The majority of judges (72.9% among district court and 61.8% among county and juvenile court) indicate that special provisions are made for selecting attorneys to handle more complex, serious or special cases (see Table 12). Although not a formal or written rule, judges indicate that only experienced or "proven" lawyers are appointed to handle more complex or serious cases. In regards to capital cases, many times judges will appoint lawyers with previous capital case experience, appoint co-counsel with previous capital case experience, or the Nebraska Commission on Public Advocacy will be appointed to represent the defendant.

Table 12: Are there Special Provisions for Selecting Attorneys in More Serious Cases?

| | <u>District Court</u> | | <u>County & Juv Court</u> | | Total |
|-----------------------|-----------------------|---------|-------------------------------|---------|-------|
| | Number | Percent | Number | Percent | |
| Special Provisions | 35 | 72.9% | 34 | 61.8% | 67.0% |
| No Special Provisions | 13 | 27.1% | 21 | 38.2% | 33.0% |
| Total | 48 | 100% | 55 | 100% | 100% |

While several attorneys perceive that judges do in fact appoint only the most experienced attorneys to handle more complex and serious cases, qualitative comments from attorneys suggest that this is not always the case. As one lawyer explains, “Newer lawyers get the majority of appointments, notwithstanding [the] severity of the case.” Another lawyer also expresses concern, “I have seen brand-new and inexperienced attorneys handling serious felony cases, which I feel is inappropriate.”

What provisions exist for ensuring the quality of representation provided by attorneys appointed to indigent clients?

Based on judges’ comments, there appears to be no “formal” provisions in place for ensuring the quality of representation provided by attorneys appointed to indigent clients. Judges, however, note that quality is ensured in several ways. First, the court continually observes/monitors the quality of representation provided by lawyers. Judicial discretion at appointment means that judges can ensure that unqualified lawyers are not appointed to begin with. Second, judges may be alerted to poor quality representation through complaints lodged by defendants. Occasionally, counsel will ask to be removed from the case if they feel unqualified. Finally, through the process of courtroom observations, judges may elect to remove counsel they feel are unqualified.

When attorneys were asked what provisions exist for ensuring the quality of representation provided by attorneys appointed to indigent clients, their responses also indicate that no “formal” provisions are in place, but that quality is monitored informally by judges who use their discretion to ensure that quality lawyers are being appointed. As one lawyer explains, “In our area, judges refuse to appoint several attorneys who have shown poor performance in the past.”

Have you ever removed an attorney from a case who had been appointed by the County Court and replaced that attorney with a new attorney in District Court?

District court judges were asked if they have ever removed an attorney from a case who had been appointed by the county court and replaced that attorney with a new attorney in district court. Nearly 60% (58.0%) of district court judges have removed an attorney who was appointed by the county court and replaced that attorney with a new attorney in district court. Primary reasons for removal include: a conflict of interest, the judge’s belief that counsel lacks the experience or qualifications to handle the case, the attorney is removed at the request of the defendant, or the judge determines that the attorney has not been responsive to his/her client.

Removal from the list

According to all judges (100%) there are no formal procedures to remove attorneys from the list. If the judge believes they are not qualified they simply will not appoint them. When asked if attorneys may remove themselves from the list, 79.4% of district court judges and 90.7% of county and juvenile court judges indicate that attorneys may remove themselves from the list (see Table 13).

Table 13: May attorneys remove themselves from the list?

| | District Court Judges | | County & Juvenile Court | | Total |
|-------|-----------------------|---------|-------------------------|---------|---------|
| | Number | Percent | Number | Percent | Percent |
| Yes | 28 | 80.0% | 49 | 90.7% | 86.5% |
| No | 7 | 20.0% | 5 | 9.3% | 13.5% |
| Total | 35 | 100% | 54 | 100% | 100% |

In most instances attorneys were simply required to notify the court of their request. Some judges require that lawyers communicate “good cause” for their removal. In smaller counties where lawyers are not as readily available, the removal of an attorney from the list is discouraged because it increases the workload of the attorneys who remain on the list. Interestingly, one judge stated that attorneys also “age out” of the list, “senior attorneys are not appointed if other attorneys are available.” While some may argue that senior attorneys have “served their time” on court appointments, removing the most experienced attorneys from the list may have repercussions on the overall quality of counsel.

Are you satisfied with your system of assigning counsel? If no, why not?

When asked if they are satisfied with their system of assigning counsel, 83.0% of district court judges and 84.2% of county and juvenile court judges indicate that they are satisfied. When asked to explain any dissatisfaction with the current system, several district court judges commented that the county court sometimes appoints less experienced lawyers in more serious or complex cases. Judges in some rural areas of the state felt that there were not enough qualified attorneys in their jurisdiction to appoint. A few judges stated that they would prefer a more formal system in which an objective list of provisions and qualifications for making appointments was available.

Attorneys who accept court appointments were also asked if they are satisfied with the system of assigning counsel. Nearly three-quarters (74.4%) of attorneys indicate that they are satisfied. When asked to explain any dissatisfaction with the current system, over 25 attorneys described the process as a “buddy system” where certain attorneys get substantially more appointments than others. Another reason for dissatisfaction included the perception that unqualified attorneys are being appointed and providing lower quality representation.

What if any recommendations would you suggest for improving the system of assigning counsel?

When asked what if any recommendations they would suggest for improving the system of assigning counsel, responses fell into the following themes:

District Court Judges

1. A formal list should be used.
2. Inclusion on the list should require special provisions or qualifications (especially for felony II cases and higher).
3. County court should consult with district court in developing the list for felony cases.

4. More eligible attorneys would be “available” if the hourly rates were increased.

County and Juvenile Court Judges

1. The Court should require more information from new attorneys regarding their qualifications and experience.
2. The list of attorneys for appointment should be divided by areas of expertise.
3. There should be a process for adding new attorneys to the list.
4. District-wide (or at least 3-4 county areas) public defender and prosecutor offices.
5. Mandatory Continuing Legal Education (MCLE) in fields of practice (criminal and juvenile).
6. The Nebraska State Bar Association should have a certification process to ensure competence.
7. County court judges should obtain feedback from district court judges regarding the ability of attorneys.
8. The Court Administrators Office should maintain the lists and disseminate them to the judges.

Attorneys Accepting Court Appointments

1. Nebraska judges need to adopt and publish a fair and uniform system for appointment of private assigned counsel.
2. Each county should be required to have a public defenders office. This should be done on a district basis for smaller counties.
3. Establish formal guidelines to ensure sufficient criminal experience and competency.
4. Outside imposed requirements such as Continuing Legal Education (CLE), and initial training reviews by peers.
5. Attorneys should have to prove that their malpractice insurance is in effect.
6. Annual review of process and quality of legal services provided by the judges.
7. Appoint counsel that are located in the county where the cases are.
8. Attorneys should be notified of court appointments as soon as possible, including contact information from the financial affidavit, so they know how to contact their clients.
9. Implement a formal application process, regular review, and fair assignment of cases.
10. Attorneys should have to certify to the court that they feel competent handling the type of case and that they have been involved in continuing education for criminal defense within the last 10-20 months.
11. The quality of representation needs to be monitored.
12. Guidelines for appointment to insure felony defendants are appointed attorneys with sufficient experience.
13. Keep and maintain a list of attorneys for appointment. Follow the list except for cases involving special skills. Revise the list annually to update attorneys’ skill level and professionalism.
14. Do not allow young attorneys without significant jury experience handle felony cases.

FEE STRUCTURE

District court judges were asked to identify the hourly rates for various case types in their counties. The hourly rates for capital felony, other felony, and felony appeals for each county are presented below.

Table 14: Hourly Rates by County

| County | District Court Judges | | |
|-----------|-----------------------|--------------|---------------|
| | Capital Felony | Other Felony | Felony Appeal |
| Adams | CPA | \$75 | \$75 |
| Antelope | \$95 | \$75 | \$75 |
| Arthur | \$100 | \$75 | \$75 |
| Banner | \$100 | \$70 | \$70 |
| Blaine | \$80 | \$80 | \$80 |
| Boone | \$70 | \$70 | \$70 |
| Box Butte | \$70 | \$70 | \$70 |
| Boyd | \$80 | \$80 | \$80 |
| Brown | \$80 | \$80 | \$80 |
| Buffalo | Negotiated | \$75 | \$65 |
| Burt | Not Available | \$60 | \$60 |
| Butler | \$70 | \$70 | \$70 |
| Cass | \$65 | \$65 | \$65 |
| Cedar | \$60 | \$60 | \$60 |
| Chase | \$75 | \$75 | \$75 |
| Cherry | \$80 | \$80 | \$80 |
| Cheyenne | \$100 | \$70 | \$70 |
| Clay | \$65 | \$65 | \$65 |
| Colfax | \$70 | \$70 | \$70 |
| Cuming | Negotiated | \$75 | \$75 |
| Custer | \$80 | \$80 | \$80 |
| Dakota | \$60 | \$60 | \$60 |
| Dawes | \$70 | \$70 | \$70 |
| Dawson | \$90 | \$75 | \$75 |
| Deuel | \$100 | \$70 | \$70 |
| Dixon | \$60 | \$60 | \$60 |
| Dodge | Negotiated | \$60 | \$60 |
| Douglas* | \$80/\$65 | \$80/\$65 | \$80/\$65 |
| Dundy | \$75 | \$75 | \$75 |
| Fillmore | \$65 | \$65 | \$65 |
| Franklin | CPA | \$75 | \$75 |
| Frontier | \$75 | \$75 | \$75 |
| Furnas | \$90 | \$75 | \$75 |
| Gage | \$100 | \$65 | \$65 |
| Garden | \$100 | \$70 | \$70 |
| Garfield | \$80 | \$80 | \$80 |
| Gosper | \$90 | \$75 | \$75 |
| Grant | \$70 | \$70 | \$70 |
| Greeley | \$80 | \$80 | \$80 |
| Hall | \$75 | \$75 | \$75 |
| Hamilton | \$70 | \$70 | \$70 |
| Harlan | CPA | \$75 | \$75 |
| Hayes | \$75 | \$75 | \$75 |
| Hitchcock | \$75 | \$75 | \$75 |
| Holt | \$80 | \$80 | \$80 |

| | | | |
|--------------|------------------|------|------|
| Hooker | \$100 | \$75 | \$75 |
| Howard | \$80 | \$80 | \$80 |
| Jefferson | \$100 | \$65 | \$65 |
| Johnson | Not Available | \$65 | \$65 |
| Kearney | CPA | \$75 | \$75 |
| Keith | \$100 | \$75 | \$75 |
| Keya Paha | \$80 | \$80 | \$80 |
| Kimball | \$100 | \$70 | \$70 |
| Knox | \$95 | \$75 | \$75 |
| Lancaster | \$85 | \$75 | \$75 |
| Lincoln | \$100 | \$75 | \$75 |
| Logan | \$100 | \$75 | \$75 |
| Loup | \$80 | \$80 | \$80 |
| Madison | Negotiated | \$75 | \$75 |
| McPherson | \$100 | \$75 | \$75 |
| Merrick | \$70 | \$70 | \$70 |
| Morrill | \$70 | \$70 | \$70 |
| Nance | \$70 | \$70 | \$70 |
| Nemaha | Not Available | \$65 | \$65 |
| Nuckolls | \$65 | \$65 | \$65 |
| Otoe | \$65 | \$65 | \$65 |
| Pawnee | Not Available | \$65 | \$65 |
| Perkins | \$100 | \$75 | \$75 |
| Phelps | CPA | \$75 | \$75 |
| Pierce | \$95 | \$75 | \$75 |
| Platte | \$70 | \$70 | \$70 |
| Polk | \$70 | \$70 | \$70 |
| Red Willow | \$75 | \$75 | \$75 |
| Richardson | \$65 | \$65 | \$65 |
| Rock | \$80 | \$80 | \$80 |
| Saline | \$65 | \$65 | \$65 |
| Sarpy | Negotiated | \$75 | \$75 |
| Saunders | \$70 | \$70 | \$70 |
| Scotts Bluff | Negotiated | \$75 | \$75 |
| Seward | \$70 | \$70 | \$70 |
| Sheridan | \$70 | \$70 | \$70 |
| Sherman | \$80 | \$80 | \$80 |
| Sioux | \$70 | \$70 | \$70 |
| Stanton | Negotiated | \$75 | \$75 |
| Thayer | \$65 | \$65 | \$65 |
| Thomas | \$100 | \$75 | \$75 |
| Thurston** | No fee structure | | |
| Valley | \$80 | \$80 | \$80 |
| Washington | \$60 | \$60 | \$60 |
| Wayne | Negotiated | \$75 | \$75 |
| Webster | CPA | \$75 | \$75 |
| Wheeler | \$80 | \$80 | \$80 |
| York | \$70 | \$70 | \$70 |

CPA= Commission on Public Advocacy

*Douglas County differentiates between in-court and out-of-court time. The hourly in-court rate is \$80. The hourly out-of-court rate is \$65.

** In Thurston County, there is no fee structure. Attorneys submit their normal hourly rates. A copy is sent to the county attorney's office. If an objection is filed the judge may lower the bill.

Capital Cases

Hourly rates range from \$60 to \$100 for capital cases with the most frequent hourly rate being in the \$70 to \$75 range. Several counties indicate that the rate is negotiated (8.6%) and various counties indicate receiving services from the Nebraska Commission on Public Advocacy (6.5%) (see Table 15).

Table 15: Hourly Rate for Capital Cases

| | <u>In-Court</u> | | <u>Out-Court</u> | |
|-------------------------------|-----------------|---------|------------------|---------|
| | Number | Percent | Number | Percent |
| \$60 or \$65 per hour | 13 | 14.0% | 14 | 15.1% |
| \$70 or \$75 per hour | 24 | 25.8% | 24 | 25.8% |
| \$80 or \$85 per hour | 17 | 18.3% | 16 | 17.2% |
| \$90 or \$95 per hour | 6 | 6.5% | 6 | 6.5% |
| \$100 per hour | 15 | 16.1% | 15 | 16.1% |
| Commission on Public Advocacy | 6 | 6.5% | 6 | 6.5% |
| Fee Negotiated | 8 | 8.6% | 8 | 8.9% |
| Not Available | 4 | 4.3% | 4 | 4.3% |
| Total | 93 | 100% | 93 | 100% |

In 2002, the Nebraska Commission on Public Advocacy Indigent Defense Standards Advisory Council developed a recommendation for compensation in capital cases:

In cases where a defendant is charged with first degree murder, lead counsel and co-counsel shall be compensated at the hourly rate of not less than \$125 with no distinction between rates for services performed in and outside of court, and the rate shall be paid for any time the attorney spends traveling in fulfilling his/her obligations to the client.

It is clear from the data presented that the majority of counties are not in compliance with the Nebraska Commission on Public Advocacy Indigent Defense Standards Advisory Council's recommendation for compensation in capital cases.

Felony and Felony Appeals

Hourly rates range from \$60 to \$80 in other felony and felony appeal cases. The most frequent hourly rate is \$75 per hour (see Table 16).

Table 16: Hourly Rate for Other Felony and Felony Appeals

| | <u>Other Felony Cases</u> | | | | <u>Felony Appeals</u> | | | |
|---------------|---------------------------|---------|------------------|---------|-----------------------|---------|-------------------|---------|
| | <u>In Court</u> | | <u>Out-Court</u> | | <u>In-Court</u> | | <u>Out- Court</u> | |
| | Number | Percent | Number | Percent | Number | Percent | Number | Percent |
| \$60 per hour | 6 | 6.5% | 6 | 6.5% | 6 | 6.5% | 6 | 6.5% |
| \$65 per hour | 13 | 14.0% | 14 | 15.1% | 14 | 15.1% | 15 | 16.1% |
| \$70 per hour | 22 | 23.7% | 22 | 23.7% | 22 | 23.7% | 22 | 23.7% |
| \$75 per hour | 35 | 37.6% | 35 | 37.6% | 34 | 36.6% | 34 | 36.6% |
| \$80 per hour | 16 | 17.2% | 15 | 16.1% | 16 | 17.2% | 15 | 16.1% |
| Missing | 1 | 1.1% | 1 | 1.1% | 1 | 1.1% | 1 | 1.1% |
| Total | 93 | 100% | 93 | 100% | 93 | 100% | 93 | 100% |

The Nebraska Commission on Public Advocacy Indigent Defense Standards Advisory Council recommends that in cases where a defendant is charged with a serious felony,

counsel should be compensated at an hourly rate of not less than \$90 and in less serious felony cases not less than \$80 per hour. Every county's hourly rates are currently below the recommended levels of compensation.

Misdemeanors and Juvenile Cases

County and juvenile court judges were asked to identify the hourly rates for various case types in their counties. The hourly rates for misdemeanors, juvenile law violations, status cases, and abuse/neglect cases are presented below.

Table 17: Hourly Rates by County

| | <u>County and Juvenile Court Judges</u> | | | |
|-----------|---|-------------------------|-----------------|---------------|
| | Misdemeanor | Juvenile Law Violations | Juvenile Status | Abuse Neglect |
| Adams | \$75 | \$75 | \$75 | \$75 |
| Antelope | \$75 | \$75 | \$75 | \$75 |
| Arthur | \$75 | \$75 | \$75 | \$75 |
| Banner | Not Available | | | |
| Blaine | \$85 | \$85 | \$85 | \$85 |
| Boone | \$75 | \$75 | \$75 | \$75 |
| Box Butte | \$50 | \$50 | \$50 | \$50 |
| Boyd | \$65 | \$65 | \$65 | \$65 |
| Brown | \$85 | \$85 | \$85 | \$85 |
| Buffalo | \$65 | \$65 | \$65 | \$65 |
| Burt | \$60 | \$60 | \$60 | \$60 |
| Butler | \$70 | \$70 | \$70 | \$70 |
| Cass | Fees determined on a case by case basis by the judge. | | | |
| Cedar | \$60 | \$60 | \$60 | \$60 |
| Chase | \$60 | \$60 | \$60 | \$60 |
| Cherry | \$85 | \$85 | \$85 | \$85 |
| Cheyenne | \$50 | \$50 | \$50 | \$50 |
| Clay | \$75 | \$75 | \$75 | \$75 |
| Colfax | \$70 | \$70 | \$70 | \$70 |
| Cuming | \$75 | \$75 | \$75 | \$75 |
| Custer | \$80 | \$80 | \$80 | \$80 |
| Dakota | \$60 | \$60 | \$60 | \$60 |
| Dawes | \$70 | \$70 | \$70 | \$70 |
| Dawson | \$75 | \$75 | \$75 | \$75 |
| Deuel | \$60 | \$60 | \$60 | \$60 |
| Dixon | \$60 | \$60 | \$60 | \$60 |
| Dodge | \$45 | \$45 | \$45 | \$45 |
| Douglas | \$50 | \$50 | \$50 | \$50 |
| Dundy | \$60 | \$60 | \$60 | \$60 |
| Fillmore | \$75 | \$75 | \$75 | \$75 |
| Franklin | \$75 | \$75 | \$75 | \$75 |
| Frontier | \$75 | \$75 | \$75 | \$75 |
| Furnas | \$75 | \$75 | \$75 | \$75 |
| Gage | \$65 | \$65 | \$65 | \$65 |
| Garden | \$60 | \$60 | \$60 | \$60 |
| Garfield | \$80 | \$80 | \$80 | \$80 |
| Gosper | \$75 | \$75 | \$75 | \$75 |
| Grant | \$70 | \$70 | \$70 | \$70 |
| Greeley | \$65 | \$65 | \$65 | \$65 |
| Hall | \$70 | \$70 | \$70 | \$70 |
| Hamilton | \$70 | \$70 | \$70 | \$70 |

| | Misdemeanor | Juvenile Law Violations | Juvenile Status | Abuse Neglect |
|--------------|-------------|-------------------------|-----------------|---------------|
| Harlan | \$75 | \$75 | \$75 | \$75 |
| Hayes | \$75 | \$75 | \$75 | \$75 |
| Hitchcock | \$75 | \$75 | \$75 | \$75 |
| Holt | \$65 | \$65 | \$65 | \$65 |
| Hooker | \$75 | \$75 | \$75 | \$75 |
| Howard | \$80 | \$80 | \$80 | \$80 |
| Jefferson | \$65 | \$65 | \$65 | \$65 |
| Johnson | \$65 | \$65 | \$65 | \$65 |
| Kearney | \$75 | \$75 | \$75 | \$75 |
| Keith | \$60 | \$60 | \$60 | \$60 |
| Keya Paha | \$85 | \$85 | \$85 | \$85 |
| Kimball | \$60 | \$60 | \$60 | \$60 |
| Knox | \$75 | \$75 | \$75 | \$75 |
| Lancaster | \$50 | \$50 | \$50 | \$50 |
| Lincoln | \$75 | \$75 | \$75 | \$75 |
| Logan | \$75 | \$75 | \$75 | \$75 |
| Loup | \$80 | \$80 | \$80 | \$80 |
| Madison | \$75 | \$75 | \$75 | \$75 |
| McPherson | \$75 | \$75 | \$75 | \$75 |
| Merrick | \$70 | \$70 | \$70 | \$70 |
| Morrill | \$50 | \$50 | \$50 | \$50 |
| Nance | \$70 | \$70 | \$70 | \$70 |
| Nemaha | \$65 | \$65 | \$65 | \$65 |
| Nuckolls | \$75 | \$75 | \$75 | \$75 |
| Otoe | \$65 | \$65 | \$65 | \$65 |
| Pawnee | \$65 | \$65 | \$65 | \$65 |
| Perkins | \$60 | \$60 | \$60 | \$60 |
| Phelps | \$75 | \$75 | \$75 | \$75 |
| Pierce | \$75 | \$75 | \$75 | \$75 |
| Platte | \$70 | \$70 | \$70 | \$70 |
| Polk | \$70 | \$70 | \$70 | \$70 |
| Red Willow | \$75 | \$75 | \$75 | \$75 |
| Richardson | \$65 | \$65 | \$65 | \$65 |
| Rock | \$85 | \$85 | \$85 | \$85 |
| Saline | \$65 | \$65 | \$65 | \$65 |
| Sarpy | \$75 | \$75 | \$75 | \$75 |
| Saunders | \$70 | \$70 | \$70 | \$70 |
| Scotts Bluff | \$50 | \$50 | \$50 | \$50 |
| Seward | \$75 | \$75 | \$75 | \$75 |
| Sheridan | \$70 | \$70 | \$70 | \$70 |
| Sherman | \$80 | \$80 | \$80 | \$80 |
| Sioux | \$70 | \$70 | \$70 | \$70 |
| Stanton | \$75 | \$75 | \$75 | \$75 |
| Thayer | \$65 | \$65 | \$65 | \$65 |
| Thomas | \$75 | \$75 | \$75 | \$75 |
| Thurston | \$60 | \$60 | \$60 | \$60 |
| Valley | \$65 | \$65 | \$65 | \$65 |
| Washington | \$60 | \$60 | \$60 | \$60 |
| Wayne | \$75 | \$75 | \$75 | \$75 |
| Webster | \$75 | \$75 | \$75 | \$75 |
| Wheeler | \$65 | \$65 | \$65 | \$65 |
| York | \$70 | \$70 | \$70 | \$70 |

According to data, counties' hourly rates do not differ across these case types. Hourly rates range from \$45 to \$85 for misdemeanor, juvenile law violations, juvenile status and abuse/neglect cases. The most frequent hourly rate for these cases is in the \$70 to \$75 range (see Table 18).

Table 18: Hourly rates for Misdemeanors, Juvenile Law Violations, Status & Abuse Neglect Cases.

| Hourly Rate | Number | Percent |
|-----------------------------|--------|---------|
| \$45 per hour | 1 | 1.1% |
| \$50-\$55 per hour | 6 | 6.5% |
| \$60-\$65 per hour | 28 | 30.1% |
| \$70-\$75 per hour | 46 | 49.5% |
| \$80-\$85 per hour | 10 | 10.8% |
| Case by Case basis by judge | 1 | 1.1% |
| Not Available | 1 | 1.1% |
| Total | 93 | 100% |

Are current hourly rates too high, adequate, or too low?

Judges were asked if they believe that the current hourly rates in their county are too high, adequate or too low. Over sixty percent (61.8%) of judges believe that the current rates in their counties are adequate. Nearly 40% (38.2%) of judges believe that the current rates in their counties are too low. None of the responding judges believe that the current rates are too high (see Table 19a). When asked to elaborate on the adequacy of the current hourly rates, some judges believed that rates should be raised to ensure that attorneys' overhead expenses are covered. Several judges, however, expressed a difficulty in effectively communicating this need to their local county boards (the relationship with county boards is discussed later in more detail).

Table 19a: Are Hourly Rates Too High, Adequate, or Too Low?

| | <u>District Court Judges</u> | | <u>County & Juvenile Court</u> | | <u>Total</u> |
|----------|------------------------------|---------|------------------------------------|---------|--------------|
| | Number | Percent | Number | Percent | Percent |
| Too High | 0 | 0.0% | 0 | 0.0% | 0.0% |
| Adequate | 29 | 58.0% | 34 | 65.4% | 61.8% |
| Too Low | 21 | 42.0% | 18 | 34.6% | 38.2% |
| Total | 50 | 100% | 52 | 100% | 100% |

Attorneys were also asked if the current rates in their counties are too high, adequate or too low. Attorneys are significantly more likely than judges to indicate that the current rates in their counties are too low. Sixty-five point nine percent (65.9%) of attorneys indicate that the current rates in their counties are too low (compared to 38.2% of judges). Thirty-four point one percent (34.1%) of attorneys indicate that the current rates are adequate. No attorneys indicate that the rates in their county are too high (see Table 19b).

Table 19b: Are hourly rates too high, adequate, or too low?

| | <u>Attorneys Accepting Appointments</u> | |
|----------|---|---------|
| | Number | Percent |
| Too High | 0 | 0.0% |
| Adequate | 59 | 34.1% |
| Too Low | 114 | 65.9% |
| Total | 173 | 100% |

When asked to elaborate on the adequacy of the current hourly rates, attorneys believe that rates should be raised to ensure that attorneys' overhead expenses are covered. Attorneys expressed concerns that because of the low rates, attorneys would not spend adequate time on the case thereby affecting the quality of work the defense receives. "The cost of practicing law is very expensive and something that those on the public side don't often realize." In fact, low rates reportedly, "do not encourage good practitioners to remain active on appointment lists."

If there is an hourly rate or flat fee who sets it and how is it determined?

In district court hourly rates are primarily set by a consensus of the district court judges. Factors that are reportedly taken into consideration include: amount paid in neighboring counties, discussions with local bar associations, fairness based on private practice fees, attorneys' overhead, and the impact on the county budget.

In county and juvenile court hourly rates are primarily set by a consensus of the judges but in some instances the rates are set in conjunction with the district court judges. Factors that are sometimes taken into consideration include: budget constraints, what is being paid in neighboring counties, discussions with attorneys, and fairness based on private practice fees.

While several judges indicate that the fees are reviewed periodically, quite a few judges indicate that the fee structure has not been reviewed in excess of 10 years. Attorneys also commented on the frequency with which fees are reviewed. One attorney stated that the fees in his/her county had not been changed since 1975. As one attorney poignantly asks, "Who waits a decade for cost of living raises?"

To what extent, if any, are county boards involved?

Aside from general budgeting authority, it appears that county boards are not typically involved in establishing the hourly rates for assigned counsel or other activities that affect assigned counsel compensation. While county boards are often consulted or notified of hourly rate changes, only one judge indicated that the county board is directly involved in setting the hourly rate (in conjunction with the local defense bar). Coincidentally, this is the county with the lowest reported hourly rates.

Although the majority of county boards are not directly involved in establishing the hourly rate, they are involved in other fiscal matters. For instance, several judges report that when expenses for appointed counsel exceed the budgeted amount, the excess must be approved by the county board. County boards have also been involved in establishing the rate of pay for public defenders and for conflict contracts.

Judges appear to believe that county boards harbor a certain amount of resentment for paying attorney fees. Several judges noted the perception that Commissioners are "constantly complaining about indigent fees." One judge elaborates:

Perhaps the Administrative Office of the Courts could build rapport with Commissioners about the costs of the legal system. I believe Commissioners tie into a belief system that once charged [defendants] are guilty and they should not waste any tax payer money on defense. The resentment toward the judicial system, specifically the cost of the criminal justice system continues to increase.

-anonymous District Court Judge

This sentiment was confirmed in comments received from County Commissioners:

We get upset with the entire judicial system. We are dissatisfied with the amount of money spent on indigent defense. It appears to us the judges appoint public defenders in too many cases. Too many cases are continued. Public defenders appeal too many decisions.

-anonymous County Commissioner

Several County Commissioners also expressed the belief that more strict criteria for determining indigence should be utilized or that indigent defendants should be required to contribute what they can to the cost of their defense. One Commissioner even suggested that defendant's reimburse the fees expended for their defense to the county as part of their sentencing.

On a larger level, under-funded court budgets undermine the justice system. The perception exists that some judges force settlement to save money. Also, "Some of the smallest counties avoid paying their fair share of costs by never arresting anyone or threatening the contract county attorney with non-renewal of contract" (anonymous District Court Judge).

Are you satisfied with the fee structure for assigned counsel in your jurisdiction?

When asked if they are satisfied with the fee structure for assigned counsel in their jurisdiction, the majority of judges (75.0%) respond that they are satisfied. One quarter (25.0%), however, indicate that they are not satisfied with the fee structure in their jurisdiction. The sentiment held by these judges is that the hourly rate is too low, and is not sufficient to cover the overhead of counsel. As one district court judge states, "You can't hire someone to fix your air conditioner for \$65 an hour." Similarly, when asked to elaborate on any dissatisfaction with the current fee structure, county and juvenile court judges commented, "Attorneys are not compensated adequately. The current fee is not commensurate with the costs of maintaining an office and the training, education, duties or liability potential associated with the practice of law."

Table 20: Are you Satisfied with the Fee Structure for Assigned Counsel in your Jurisdiction?

| | <u>District Court Judges</u> | | <u>County and Juvenile Court Judges</u> | | <u>Total</u> |
|-------|------------------------------|---------|---|---------|--------------|
| | Number | Percent | Number | Percent | Percent |
| Yes | 36 | 76.6% | 42 | 73.7% | 75% |
| No | 11 | 23.4% | 15 | 26.3% | 25% |
| Total | 47 | 100% | 57 | 100% | 100% |

Is the level of compensation sufficient to attract and retain qualified counsel?

Judges were asked if the level of compensation was sufficient to attract and retain qualified counsel in private assigned counsel, contract defender and elected public defender programs. Results indicate that the majority of district judges believe that the levels of compensation are sufficient to attract and retain qualified counsel in private assigned counsel programs (79.2%) and elected public defender programs (77.3%). Less than half of district court judges (46.9%) believe that the levels of compensation are sufficient to attract and retain qualified counsel in contract defender programs. The majority of county and juvenile court judges also believe that the levels of compensation are sufficient to attract and retain qualified counsel in private assigned counsel programs (76.8%), contract defender programs (82.1%), and elected public defender programs (81.0%).

Table 21: Is the Level of Compensation Sufficient to Attract and Retain Qualified Counsel?

| | <u>District Court Judges</u> | | | | <u>County and Juvenile Court Judges</u> | | | |
|--------------------------|------------------------------|---------|--------|---------|---|---------|--------|---------|
| | Yes | | No | | Yes | | No | |
| | Number | Percent | Number | Percent | Number | Percent | Number | Percent |
| Private Assigned Counsel | 38 | 79.2% | 10 | 20.8% | 43 | 76.8% | 13 | 23.2% |
| Contract Defender | 15 | 89.9% | 4 | 21.1% | 23 | 82.1% | 5 | 17.9% |
| Elected Public Defender | 34 | 82.9% | 7 | 17.1% | 34 | 81.0% | 8 | 19.0% |

Judges who believe that the levels of compensation are not sufficient to attract and retain qualified counsel were asked to state what levels of compensation they recommend as adequate. At the district court level, responses ranged from \$75 per hour to \$135 per hour, with the most common response being \$100 per hour. As one district court judge explains, “You cannot expect private assigned counsel to accept frequent appointments unless compensation is close to their hourly rate of retained counsel.” In addition to commenting on the hourly rates for private assigned counsel, several district court judges commented on the need for higher public defender salaries in their counties. As one judge remarks, “I don’t know how they get anybody to be a public defender in my counties.”

County and juvenile court judges who do not believe that the levels of compensation are adequate also called for fee raises. When asked to state what levels of compensation they recommended as adequate, responses ranged from \$70 per hour to \$110 an hour. As one judge remarked, “The base rate should be increased by 5-10% every 3-5 years. If we don’t pay a competitive rate, we loose our most qualified practitioners.” Several county and juvenile court judges also commented on public defender salaries, stating that the salaries of public defenders should be commensurate with the County Attorney’s salary (this issue is discussed later in more detail).

Attorneys were also asked if, in their opinion, the level of compensation was sufficient to attract and retain qualified counsel. Unlike judges, the majority of attorneys believe that the level of compensation is not sufficient to attract and retain qualified private assigned counsel (see Table 22).

Table 22: Are Current Rates Sufficient to Attract and Retain Qualified Private Assigned Counsel?

| | Attorneys | |
|-------|-----------|---------|
| | Number | Percent |
| Yes | 68 | 39.8% |
| No | 103 | 60.2% |
| Total | 171 | 100% |

While many attorneys simply conveyed that the rates are too low and suggested specific dollar rates or referenced a desire for the rate to cover their overhead expenses, two other themes emerged. The first theme is the issue of whether or not the rates were encouraging or inhibiting attorneys from accepting appointments. “After five years I am considering myself ‘qualified’, however, my practice is large enough now that I am considering dropping court appointments in state court because of the low rates.” Several comments similar to the following were also received, “There are a limited number of attorneys in the area and most established ones will not work for the rates paid.” “I would take more of them if the rates were higher, and I imagine other attorneys would do the same.”

On the other side of the issue, attorneys focus on the ethical obligation rather than the rates, “I do not believe the rates being paid will induce counsel from other areas to take assignments. I believe qualified counsel in this area take appointments out of a sense of duty and necessity.” Another attorney states, “I think most court appointed attorneys feel they take these cases to assist the court. New attorneys take them because it gets them into court and it is a place to learn.”

Age appears to be a factor in considering whether or not to take appointments, as the quote above implies, many new attorneys accept court appointments as a way to build experience. Several older attorneys believe that at some point, they have served their ethical obligation to take court appointments, “I would like to end my appointed counsel duties at age 58 but feel I would be adding to the burdens of other local attorneys.”

Parity of Salaries

Parity with county attorneys’ salaries was further examined in surveys to County Commissioners. Commissioners indicated the working status (full-time or part time) of their county attorneys and public defenders as well as their annual salaries. The table below presents the counties which have equal levels of staffing in each office (i.e. a full-time county attorney and a full-time public defender or a part-time county attorney and a part-time public defender).

Data indicate that there are only two counties (Lancaster and Richardson) which pay their county attorneys and public defenders on an equal basis. It is likely that Colfax county also belongs in this category. (Although reported salaries show that the contract public defender’s salary exceeds that of the county attorneys, the county attorney receives a full benefits package while the public defender does not). In the majority of counties, the county attorney salary exceeds that of the public defender salary, ranging from only a \$1,875 difference to as much as a \$22,209 difference per year. There are two counties in

which the Public Defender salary exceeds that of the County Attorney (Gage and Red Willow which both have contract defender programs).

Table 23: Counties with Similar Pay Structure

| County | County Attorney Salary | Full-time/Part-time | Public Defender Salary | Type of PD | Full-time/Part-time | Difference |
|---------------------|------------------------|---------------------|------------------------|------------|---------------------|--------------|
| Lancaster | \$ 113,630.00 | FT | \$ 113,630.00 | EPD | FT | \$ 0 |
| Hall | \$ 63,654.00 | FT | \$ 55,268.99 | EPD | FT | \$ 8,385.01 |
| Otoe | \$ 49,500.00 | PT | \$ 36,000.00 | EPD | PT | \$ 13,500 |
| Madison | \$ 65,000.00 | FT | \$ 55,000.00 | EPD | FT | \$ 10,000 |
| Antelope | \$ 35,600.00 | PT | \$ 32,004.00 | CPD | PT | \$ 3,596 |
| Adams | \$ 54,625.00 | FT | \$ 38,800.00 | EPD | FT | \$ 15,825 |
| Boone | \$ 35,223.00 | PT | \$ 32,000.00 | CPD | PT | \$ 3,223 |
| Colfax ⁵ | \$ 40,000.00 | PT | \$ 55,000.00 | CPD | PT | \$ -15,000 |
| Dakota | \$ 60,996.81 | FT | \$ 47,154.49 | EPD | FT | \$ 13,842.62 |
| Gage | \$ 64,376.00 | FT | \$ 84,000.00 | CPD | FT | \$ -19,624 |
| Hitchcock | \$ 29,651.40 | PT | \$ 15,375.00 | CPD | PT | \$ 14,276.4 |
| Jefferson | \$ 39,000.00 | PT | \$ 42,000.00 | CPD | PT | \$ 3,000 |
| Kearney | \$ 32,244.00 | PT | \$ 18,727.20 | EPD | PT | \$ 13,516.8 |
| Keith | \$ 55,315.00 | PT | \$ 49,000.00 | CPD | PT | \$ 6,315 |
| Lincoln | \$ 68,494.98 | FT | \$ 46,285.00 | EPD | FT | \$ 22,209.98 |
| Phelps | \$ 44,619.00 | PT | \$ 23,172.00 | EPD | PT | \$ 21,447 |
| Red Willow | \$ 36,000.00 | PT | \$ 48,000.00 | CPD | PT | \$ -12,000 |
| Richardson | \$ 40,200.00 | PT | \$ 40,200.00 | CPD | PT | \$ 0 |
| Scotts Bluff | \$ 59,647.08 | FT | \$ 51,709.44 | EPD | FT | \$ 7,937.64 |
| York | \$ 56,329.49 | FT | \$ 44,258.89 | EPD | FT | \$ 12,070.60 |
| Saline | \$ 43,725.00 | PT | \$ 45,600.00 | CPD | PT | \$ 1,875 |

Nine of the responding counties do not staff county attorneys and public defenders (either elected or contract) on an equal basis (i.e. a full-time county attorney and a part-time public defender or visa versa). The salary differentials for these counties are presented below in Table 24.

Table 24: Counties with Dissimilar Pay Structure

| County | County Attorney Salary | Full-time/Part-time | Public Defender Salary | Type of PD | Full-time/Part-time |
|------------------------|------------------------|---------------------|------------------------|------------|---------------------|
| Seward | \$ 55,000.00 | FT | \$ 37,500.00 | EPD | PT |
| Butler | \$ 35,150.00 | FT | \$ 43,930.00 | CPD | PT |
| Custer | \$ 55,294.38 | FT | \$ 30,000.00 | CPD | PT |
| Dawes | \$ 41,531.00 | PT | \$ 29,703.00 | EPD | FT |
| Knox ⁶ | \$ 35,699.29 | FT | \$ 25,000.00 | CPD | PT |
| McPherson ⁷ | \$ 9,200.00 | FT | | CPD | |
| Pierce ⁸ | \$ 40,000.00 | FT | \$ 36,000.00 | CPD | PT (2) |
| Saunders | \$ 60,000.00 | FT | \$ 38,000.00 | EPD | PT |
| Thayer | \$ 39,336.00 | FT | \$ 21,000.00 | CPD | PT |

⁵ The Colfax county attorney is contracted with county benefits; contracted public defender is contracted with no benefits.

⁶ Public defender contract shared with Holt County.

⁷ Public defender contracted with local attorney for \$75.00 per hour in McPherson.

⁸ Pierce County contracts two public defenders at \$18,000 each per year.

What, if any, recommendations would you suggest for improving the fee structure for assigned counsel in your jurisdiction?

When asked what, if any, recommendations they would suggest for improving the fee structure, several judges and attorneys simply stated that fees should be raised. Others offered more specific recommendations:

District Court Judges

1. Establishing a definite periodic review of fees (such as every two years).
2. Developing a chart indicating court-appointed attorney fee rates throughout the state would be useful to provide to County Boards.
3. Assistance from the Administrative Office of the Courts in presenting fee increases to County Boards.
4. A uniform fee structure for the state.

County and Juvenile Court Judges

1. Contracts for public defender conflicts and juvenile status cases.
2. District-wide standards and/or contract attorneys.
3. A system which identifies “partial qualifiers”, requiring defendants to pay part of the expense.
4. A uniform fee structure for the state.
5. A cost sharing program to reimburse impacted local county boards from a fund generated by tax on alcohol and other substances which when used generate police intervention (major and minor) the fund distribution to be done actuarially to avoid the prohibition of earmarked tax programs.
6. Different rates/fees for in-court time vs. certain other activities, particularly in 3(a) cases.
7. The county board should not make assigned counsel fees part of our budget since we have no real control over the actual expense.
8. We need to find a way to address the financial impact of an event like the Ryan case.

Attorneys

1. Require an increase in training/experience/continuing education in exchange for increased pay.
2. Adopt a statewide uniform fee structure.
3. A district-wide public defender office for smaller counties.
4. The county would be better served by regional or district defense and prosecuting attorneys. Counties could contribute set budgeted amounts to operate district/regional offices. You would have professional qualified attorneys who would get a paycheck guaranteed and defendants would get competent defense.
5. Review fees every two years.
6. The court should not differentiate between in-court and out-of-court time.

COMPENSATION PROCEDURES

Do you require a detailed statement from the attorney on how they spent time on the case?

All judges (100%) require a detailed statement from the attorney on how they spent time on the case. When asked who reviews the amounts billed by assigned counsel, 68.8% of district court judges indicate that the statements are reviewed by District Court Judges. Fourteen point six percent (14.6%) indicate that bills are reviewed by both the District Court Judge and court staff and 12.5% indicate that bills are reviewed by both the District Court Judge and the County Attorney. Four point two percent (4.2%) are reviewed by court staff or court administrators.

Table 25: Who Reviews the Amounts Billed by Attorneys (District Court Judges)

| | Number | Percent |
|--|--------|---------|
| District Court Judge(s) | 33 | 68.8% |
| District Court Judge and Court Staff | 7 | 14.6% |
| District Court Judge and County Attorney | 6 | 12.5% |
| Court Staff/Administration | 2 | 4.2% |
| Total | 48 | 100% |

Over half (51.0%) of county and juvenile court judges indicate that the judges solely review the amounts billed by assigned counsel. Twenty-two point six percent (22.6%) indicate that bills are reviewed by judges and court staff and 13.2% indicate that bills are reviewed by both the Judge and the county attorney. Thirteen point two percent (13.2%) indicate that bills are reviewed solely by court staff or administrators.

Table 26: Who Reviews the Amounts Billed by Attorneys (County and Juvenile Court Judges)

| | Number | Percent |
|----------------------------|--------|---------|
| Judge(s) | 27 | 51.0% |
| Judge and Court Staff | 12 | 22.6% |
| Judge and County Attorney | 7 | 13.2% |
| Court Staff/Administration | 7 | 13.2% |
| Total | 53 | 100% |

Is the amount authorized for payment ever less than the amount requested?

When asked if the amount authorized for payment has ever been less than the amount requested, 87.5% of district court judges and 89.3% of county and juvenile court judges responded that it has. However, this does not appear to be a frequent occurrence. When asked how often bills are reduced the majority of judges (65.3%) report that it *seldom* happens. Twenty-six point seven percent (26.7%) report that it *sometimes* happens and 5.9% report that it *never* happens (see Table 27a).

Table 27a: How Often are Bills Reduced?

| | <u>District Court</u> | | <u>County & Juvenile Court</u> | | <u>Total</u> |
|-----------|-----------------------|---------|------------------------------------|---------|--------------|
| | Number | Percent | Number | Percent | Percent |
| Always | 0 | 0.0% | 0 | 0.0% | 0.0% |
| Often | 0 | 0.0% | 2 | 3.8% | 2.0% |
| Sometimes | 11 | 22.9% | 16 | 30.2% | 26.7% |
| Seldom | 33 | 68.8% | 33 | 62.3% | 65.3% |
| Never | 4 | 8.3% | 2 | 3.8% | 5.9% |
| Total | 48 | 100% | 53 | 100% | 100% |

Attorneys were asked if the amount authorized for payment is ever less than the amount they expected to receive. Five point seven percent (5.7%) of attorneys report that this *always* happens. Over one-third of attorneys (33.9%) report that this *sometimes* happens and 42.0% percent indicate that it *seldom* happens (see Table 27b). Comments reveal that bill reductions vary by judge. Some judges pay postage and mileage while others do not. Several attorneys perceive that the cuts made by judges are arbitrary as they do not often receive any explanation for why their bills are reduced. Apparently bill reductions which are viewed as unfair may dissuade some attorneys from accepting appointments, “I prefer not to take them in misdemeanor cases because they do not pay enough and the county judges reduce the bills to unreasonable amounts.”

Table 27b: Attorneys: How often are Bills Reduced?

| | <u>Attorneys</u> | |
|-----------|------------------|---------|
| | Number | Percent |
| Always | 5 | 5.7% |
| Often | 8 | 9.1% |
| Sometimes | 31 | 35.2% |
| Seldom | 37 | 42.0% |
| Never | 7 | 8.0% |
| Total | 88 | 100% |

Under what circumstances are bills reduced?

Judges report reducing bills for: exceeding the specified maximum, duplicate charges, excessive hours, accounting errors, excessive research, failure to bill per reimbursement rate, and billing for travel time. Judges suggest that many new, less experienced lawyers may have bills reduced because they spend too much time preparing for non-complex cases. Bills are also occasionally reduced following a hearing requested by the county attorney.

Have you expended money out of your own pocket for litigation related expenses for which you have not been or do not expect to be reimbursed?

Over one-third of attorneys (34.7%) indicate that they have expended money out of their own pocket for litigation related expenses for which they have not or do not expect to be reimbursed.

Table 28: Have you Expended Money out of your Own Pocket for Litigation Related Expenses for which you have not been or do not Expect to be Reimbursed?

| | Attorneys | |
|-------|-----------|---------|
| | Number | Percent |
| Yes | 58 | 34.7% |
| No | 109 | 65.3% |
| Total | 167 | 100% |

Expenses for which attorneys have not been reimbursed include: parking, copy fees, mileage expenses, collect and long distance telephone calls, postage, drug testing, expert fees, written materials for forensic research, haircuts and clothing for their client at trial, certified copies of court records, paralegal time, photo evidence, copies of police reports, and polygraphs. Some attorneys also report the costs of language interpreters being denied for meetings with clients and depositions.

When are attorneys paid?

Judges were asked to indicate if attorneys are paid periodically throughout the case or at the end of the case. Overall, 50.5% of judges indicate that lawyers are paid periodically throughout the case, 43.9% indicate that lawyers are paid at the conclusion of the case, and 5.6% selected the “other” category. When asked to elaborate, these judges indicate that bills are submitted at the discretion of the attorney (either periodically or at the conclusion of the case). Data indicate that county and juvenile court judges are more likely to allow billing periodically throughout the case (56.9%) (several judges indicate that they prefer a monthly billing cycle) than are district court judges (42.0%).

Table 29: When are Attorneys Paid?

| | District Court | | County & Juvenile Court | | Total |
|----------------------------------|----------------|---------|-------------------------|---------|---------|
| | Number | Percent | Number | Percent | Percent |
| Periodically throughout the case | 21 | 42.0% | 33 | 56.9% | 50.5% |
| At the end of the case | 27 | 54.0% | 20 | 34.5% | 43.9% |
| Other | 1 | 2.0% | 5 | 8.6% | 5.6% |
| Total | 49 | 100.0% | 58 | 100% | 100% |

Are you satisfied with the system of compensating counsel used in your jurisdiction?

Nearly all (95.4%) district court judges indicate that they are satisfied with the system of compensating counsel (submission, review and payment of attorney fees) in their jurisdiction. Overall, the majority of county and juvenile court judges are satisfied with the system of compensating counsel (80.7%) but overall they are less satisfied with the system than are district court judges.

Table 30: Are you Satisfied with the System of Compensating Counsel used in your Jurisdiction?

| | District Court | | County & Juvenile Court | | Total |
|-------|----------------|---------|-------------------------|---------|---------|
| | Number | Percent | Number | Percent | Percent |
| Yes | 43 | 95.4% | 46 | 80.7% | 87.3% |
| No | 2 | 4.6 | 11 | 19.3% | 12.7% |
| Total | 45 | 100% | 57 | 100% | 100% |

Judges who chose to comment believe that the system for compensating counsel worked well but suggested that because of the strain on local budgets, state allocations are needed. Others believe that the system of compensating counsel would be more efficient if an electronic system were in place.

Attorneys are significantly less satisfied with the system for compensating counsel than are judges. Just over half of attorneys (53.5%) indicate that they are satisfied with their county's system for compensating private assigned counsel (compared to 87.3% of judges).

Table 30b: Are you satisfied with the system of compensating counsel used in your jurisdiction?

| | Attorneys | |
|-------|-----------|---------|
| | Number | Percent |
| Yes | 88 | 53.5% |
| No | 77 | 46.5% |
| Total | 165 | 100% |

Attorneys identified four primary concerns with compensation procedures. The first concern is the County Attorneys' involvement in compensating defense counsel. "Some counties require that all applications must be set for hearing. Most require bills to be approved by the county attorney." Defense attorneys believe that there is a conflict of interest for prosecutors to have involvement in their fee claims.

The second area is the reduction of bills by judges. Many attorneys feel that judges' reductions are sometimes arbitrary; or are based on county budget concerns rather than what is fair, "county court judges should not consider a county's budgetary difficulties when considering a fee request." One attorney recommended the need for clear protocol for what attorneys can bill for and what they cannot.

The third area of concern is that bills are not paid in a timely manner, which is caused by two separate issues. The first concern is the time-frame for when bills may be submitted. As one attorney explains, "Some counties do not allow you to submit billings unless the case is finished. It then can become difficult to bankroll the more complex cases." Several attorneys indicated that it would be preferable to submit bills on a monthly basis rather than at the conclusion of the case. The second issue is that even after bills are submitted and approved attorneys may not receive their actual payment until months later. As one attorney explains, "Even though the courts approve the fee requests submitted by the attorneys, the county commissioners appear to drag their feet in paying the bills. Sometimes as long as four to five months elapses from time of court approval to payment."

A final area of concern is the use of a bifurcated rate structure (according to the data collected this only occurs in Douglas County). Indeed, this practice is not in compliance with the National Legal Aid and Defender Association's (NLADA) recommendation, which states, "Attorneys shall be compensated at an hourly rate, with no distinction between rates for services performed in and outside of court" (Standard 4.7.2 Method of Compensation).

In regards to the system of compensating counsel, what, if any recommendations would you suggest?

When asked what if any recommendations they would suggest for improving the system for compensating private assigned counsel (submission, review and payment of attorney fees), responses fell into the following themes:

District Court Judges

(no recommendations specific to the system of compensating counsel were offered).

County and Juvenile Court Judges

1. An electronic/computerized system would be helpful.

Attorneys Accepting Court Appointments

1. The County Attorney should not be involved in making claims.
2. Fees should not be arbitrarily reduced.
3. There should be an option to be paid monthly rather than at the end of the appointment (it is difficult to bankroll more complex cases).
4. Do not differentiate between in-court and out-of-court time.
5. Clear protocol for what is paid and what is not.
6. Voucher forms for payment claims.
7. Do not put applications for fees on court docket for approval.
8. Counties should promptly pay bills.

CAPITAL CASE APPOINTMENTS

Likelihood of a second attorney being appointed

Attorneys were asked how common it is for a second attorney to be appointed to represent an indigent defendant charged with a capital offense. Twenty-five point five percent (25.5%) of attorneys indicate that a second attorney is *always* appointed. Forty-three point nine percent (43.9%) report that a second attorney is *sometimes* appointed. Twenty-two point four percent (22.4%) of attorneys indicate that a second attorney is *rarely* appointed and 8.2% indicate that a second attorney is *never* appointed.

Table 31: How Common is it for a Second Attorney to be Appointed to Represent an Indigent Defendant Charged with a Capital Offense?

| | Number | Percent |
|---------------------|--------|---------|
| Always appointed | 25 | 25.5% |
| Sometimes appointed | 43 | 43.9% |
| Rarely appointed | 22 | 22.4% |
| Never appointed | 8 | 8.2% |
| Total | 98 | 100% |

Special Qualifications

Attorneys were asked to detail, what if any special qualifications an attorney must possess to be appointed to co-defend a client in a capital case. Based on their responses, there appears to be no “formal qualifications” but attorneys in general indicate that significant experience trying serious felony cases is necessary.

Adequacy of Compensation

Attorneys who indicated that they have been appointed to a capital case were asked what their experience was in terms of adequacy of compensation. Over one-third (36.6%) of the attorneys who responded to the question indicated that their pay was less than adequate. Several attorneys commented that their bills were “arbitrarily reduced” by the judge, while others expressed altercations with county attorneys and county boards over the fees.

Sufficiently knowledgeable

When asked if attorneys felt sufficiently knowledgeable in capital criminal law and procedure when they represented their client in a capital case, 85.7% of attorneys indicate that they did and 14.3% indicate that they did not.

Table 32: Did you Feel Sufficiently Knowledgeable in Capital Criminal Law and Procedure to Represent a Client in Such Case?

| | Number | Percent |
|-------|--------|---------|
| Yes | 42 | 85.7% |
| No | 7 | 14.3% |
| Total | 49 | 100.0% |

Willingness to be Appointed to a Capital Case

Of the attorneys who indicated that they have been appointed in a capital case appointment, 70.2% indicate that they would be willing to accept another capital appointment. Those unwilling to accept another appointment provided various reasons including: insufficient time, insufficient fees, and a drain on their private practice. Several attorneys stated that they would consider accepting the appointment if co-counsel was appointed and if other resources were made available.

Table 33: Are you Willing to Accept Another Capital Appointment?

| | Number | Percent |
|-------|--------|---------|
| Yes | 40 | 70.2% |
| No | 17 | 29.8% |
| Total | 57 | 100% |

Of the attorneys who have never been appointed in a capital case, 41.7% indicate that they would be willing to accept a capital case appointment (see Table 34). The 58.3% indicating that they would not be willing to accept a capital case appointment provided various reasons including: they did not feel sufficiently qualified and constraint on time and their private practice. Several attorneys indicate that they may be willing to be appointed as co-counsel to a lead counsel with more capital case experience.

Table 34: If you have never accepted a capital case appointment, would you be willing to do so?

| | Number | Percent |
|-------|--------|---------|
| Yes | 43 | 41.7% |
| No | 60 | 58.3% |
| Total | 103 | 100% |

Special Training and Qualifications

Attorneys were asked if they think that lawyers appointed to represent indigent defendants in capital cases should have special training and qualifications. Ninety point six percent (90.6%) of attorneys believe that lawyers appointed to represent indigent defendants in capital cases should have special training and qualifications, 9.4% do not.

Table 35: Do you think that lawyers appointed to represent indigent defendants in capital cases should have special training and qualifications?

| | Number | Percent |
|-------|--------|---------|
| Yes | 144 | 90.6% |
| No | 15 | 9.4% |
| Total | 159 | 100% |

When asked to elaborate, several different responses emerged. All attorneys believe that capital-case-defendants should receive high quality defense. Overall, attorneys feel experience is more important than training but that training should be available (mentoring and Continuing Legal Education (CLE) on the topic).

QUALITY OF REPRESENTATION

How do the various types of programs rate in quality of representation?

Judges were asked to rate the quality of representation by the various types of indigent defense programs in the following areas of advocacy: preparation, bond arguments, pre-trial conferences, plea negotiations, motions, bench trial advocacy, jury trial advocacy, knowledge/use of criminal procedure and law, knowledge/use of juvenile procedure and law, dispositional advocacy and overall representation.

In general, tables 36-46 show that judges rate contract defenders are the most likely to be rated “below average” in the various areas of advocacy as compared to privately assigned counsel, elected public defenders, and retained counsel.

Table 36: Preparation

| | Poor | Substandard | Average | Good | Excellent |
|---|------|-------------|---------|-------|-----------|
| <u>District Court Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=42) | 0.0% | 2.4% | 21.4% | 47.6% | 28.6% |
| Contract Defender (n=33) | 0.0% | 17.6% | 23.5% | 23.5% | 35.3% |
| Elected Public Defender (n=38) | 2.6% | 7.9% | 23.7% | 26.3% | 39.5% |
| Retained Counsel (n=42) | 0.0% | 2.4% | 16.7% | 59.5% | 21.4% |
| <u>County and Juvenile Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=47) | 0.0% | 2.1% | 14.9% | 61.7% | 21.3% |
| Contract Defender (n=20) | 0.0% | 10.0% | 30.0% | 50.0% | 10.0% |
| Elected Public Defender (n=40) | 0.0% | 7.5% | 27.5% | 42.5% | 22.5% |
| Retained Counsel (n=44) | 0.0% | 0.0% | 9.1% | 72.7% | 18.2% |

Table 37: Bond Arguments

| | Poor | Substandard | Average | Good | Excellent |
|---|------|-------------|---------|-------|-----------|
| <u>District Court Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=42) | 0.0% | 2.4% | 26.2% | 40.5% | 31.0% |
| Contract Defender (n=17) | 0.0% | 17.6% | 29.4% | 23.5% | 29.4% |
| Elected Public Defender (n=38) | 2.6% | 5.3% | 21.1% | 28.9% | 42.1% |
| Retained Counsel (n=40) | 2.6% | 2.3% | 16.3% | 51.1% | 27.9% |
| <u>County and Juvenile Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=43) | 0.0% | 4.7% | 16.3% | 55.8% | 23.3% |
| Contract Defender (n=17) | 0.0% | 5.9% | 29.4% | 52.9% | 11.8% |
| Elected Public Defender (n=36) | 0.0% | 2.8% | 19.4% | 47.2% | 30.6% |
| Retained Counsel (n=41) | 0.0% | 2.4% | 14.6% | 63.4% | 19.5% |

Table 38: Pre-Trial Conferences

| | Poor | Substandard | Average | Good | Excellent |
|---|------|-------------|---------|-------|-----------|
| <u>District Court Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=39) | 0.0% | 5.1% | 20.2% | 30.8% | 35.9% |
| Contract Defender (n=16) | 0.0% | 18.8% | 25.0% | 25.0% | 31.3% |
| Elected Public Defender (n=37) | 2.7% | 10.8% | 21.6% | 29.7% | 35.1% |
| Retained Counsel (n=40) | 0.0% | 4.9% | 17.1% | 53.6% | 24.4% |
| <u>County and Juvenile Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=46) | 0.0% | 2.2% | 19.6% | 58.7% | 19.6% |
| Contract Defender (n=18) | 0.0% | 11.1% | 27.8% | 55.6% | 5.6% |
| Elected Public Defender (n=38) | 2.6% | 2.6% | 28.9% | 44.7% | 21.1% |
| Retained Counsel (n=42) | 0.0% | 0.0% | 19.0% | 64.3% | 16.7% |

Table 39: Plea Negotiations

| | Poor | Substandard | Average | Good | Excellent |
|---|------|-------------|---------|-------|-----------|
| <u>District Court Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=40) | 2.5% | 0.0% | 20.0% | 45.0% | 32.5% |
| Contract Defender (n=16) | 6.3% | 3.3% | 31.3% | 25.0% | 31.3% |
| Elected Public Defender (n=35) | 5.7% | 5.7% | 11.4% | 25.7% | 51.4% |
| Retained Counsel (n=40) | 0.0% | 2.5% | 10.0% | 60.0% | 27.5% |
| <u>County and Juvenile Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=48) | 0.0% | 2.1% | 10.4% | 56.3% | 31.3% |
| Contract Defender (n=21) | 0.0% | 9.5% | 9.5% | 61.9% | 19.0% |
| Elected Public Defender (n=40) | 0.0% | 2.5% | 20.0% | 47.5% | 30.0% |
| Retained Counsel (n=44) | 0.0% | 0.0% | 6.8% | 63.6% | 29.5% |

Table 40: Motions

| | Poor | Substandard | Average | Good | Excellent |
|---|------|-------------|---------|-------|-----------|
| <u>District Court Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=21) | 0.0% | 0.0% | 26.2% | 42.9% | 31.0% |
| Contract Defender (n=17) | 5.9% | 11.8% | 23.5% | 29.4% | 29.4% |
| Elected Public Defender (n=38) | 2.6% | 0.0% | 23.7% | 34.2% | 39.5% |
| Retained Counsel (n=43) | 0.0% | 2.3% | 14.0% | 51.1% | 32.6% |
| <u>County and Juvenile Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=47) | 0.0% | 2.1% | 17.0% | 61.7% | 19.1% |
| Contract Defender (n=18) | 0.0% | 5.6% | 22.2% | 61.1% | 11.1% |
| Elected Public Defender (n=39) | 0.0% | 0.0% | 25.6% | 48.7% | 25.6% |
| Retained Counsel (n=43) | 0.0% | 0.0% | 14.0% | 69.8% | 16.3% |

Table 41: Bench Trial Advocacy

| | Poor | Substandard | Average | Good | Excellent |
|---|------|-------------|---------|-------|-----------|
| <u>District Court Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=42) | 0.0% | 2.4% | 26.2% | 38.1% | 33.3% |
| Contract Defender (n=16) | 0.0% | 16.1% | 25.0% | 25.0% | 31.3% |
| Elected Public Defender (n=37) | 2.7% | 2.7% | 21.6% | 21.6% | 51.4% |
| Retained Counsel (n=42) | 0.0% | 2.4% | 11.9% | 61.9% | 23.8% |
| <u>County and Juvenile Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=47) | 0.0% | 0.0% | 8.5% | 61.7% | 29.8% |
| Contract Defender (n=19) | 0.0% | 0.0% | 21.1% | 63.2% | 15.8% |
| Elected Public Defender (n=39) | 0.0% | 0.0% | 17.9% | 48.7% | 33.3% |
| Retained Counsel (n=44) | 0.0% | 0.0% | 6.8% | 75.0% | 18.2% |

Table 42: Jury Trial Advocacy

| | Poor | Substandard | Average | Good | Excellent |
|---|------|-------------|---------|-------|-----------|
| <u>District Court Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=42) | 0.0% | 4.8% | 21.4% | 40.5% | 33.4% |
| Contract Defender (n=16) | 0.0% | 18.8% | 25.1% | 25.0% | 31.3% |
| Elected Public Defender (n=37) | 5.4% | 2.7% | 16.2% | 18.9% | 56.8% |
| Retained Counsel (n=42) | 2.4% | 2.4% | 9.5% | 57.0% | 26.2% |
| <u>County and Juvenile Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=41) | 0.0% | 0.0% | 14.6% | 53.7% | 31.7% |
| Contract Defender (n=15) | 0.0% | 0.0% | 20.0% | 53.3% | 26.7% |
| Elected Public Defender (n=34) | 0.0% | 0.0% | 20.6% | 41.2% | 38.2% |
| Retained Counsel (n=40) | 0.0% | 0.0% | 12.5% | 60.0% | 27.5% |

Table 43: Knowledge/Use of Criminal Procedure and Law

| | Poor | Substandard | Average | Good | Excellent |
|---|------|-------------|---------|-------|-----------|
| <u>District Court Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=42) | 0.0% | 4.8% | 31.0% | 28.6% | 35.7% |
| Contract Defender (n=16) | 0.0% | 17.6% | 17.6% | 35.3% | 29.4% |
| Elected Public Defender (n=37) | 5.3% | 2.6% | 10.5% | 28.9% | 52.6% |
| Retained Counsel (n=42) | 0.0% | 4.7% | 9.9% | 55.8% | 25.6% |
| <u>County and Juvenile Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=47) | 0.0% | 0.0% | 21.3% | 53.2% | 25.5% |
| Contract Defender (n=17) | 0.0% | 0.0% | 29.4% | 52.9% | 17.6% |
| Elected Public Defender (n=38) | 0.0% | 0.0% | 10.5% | 44.7% | 44.7% |
| Retained Counsel (n=42) | 0.0% | 0.0% | 21.4% | 59.5% | 19.0% |

Table 44: Knowledge/Use of Juvenile Procedure and Law

| | Poor | Substandard | Average | Good | Excellent |
|---|------|-------------|---------|-------|-----------|
| <u>County and Juvenile Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=42) | 0.0% | 0.0% | 19.0% | 59.5% | 21.4% |
| Contract Defender (n=20) | 0.0% | 0.0% | 15.0% | 70.0% | 15.0% |
| Elected Public Defender (n=33) | 0.0% | 3.0% | 18.2% | 36.4% | 57.6% |
| Retained Counsel (n=37) | 0.0% | 0.0% | 32.4% | 56.8% | 10.8% |

Table 45: Dispositional Advocacy

| | Poor | Substandard | Average | Good | Excellent |
|---|------|-------------|---------|-------|-----------|
| <u>District Court Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=41) | 0.0% | 7.3% | 22.0% | 43.9% | 26.8% |
| Contract Defender (n=16) | 6.3% | 12.5% | 12.5% | 37.5% | 31.3% |
| Elected Public Defender (n=38) | 5.3% | 2.6% | 13.2% | 34.2% | 44.7% |
| Retained Counsel (n=41) | 2.4% | 2.4% | 12.2% | 56.1% | 26.8% |
| <u>County and Juvenile Judges Responses</u> | | | | | |
| Private Assigned Counsel (n=46) | 0.0% | 0.0% | 13.0% | 67.4% | 19.6% |
| Contract Defender (n=21) | 0.0% | 0.0% | 19.0% | 66.7% | 14.3% |
| Elected Public Defender (n=35) | 0.0% | 3.0% | 17.1% | 48.6% | 34.3% |
| Retained Counsel (n=43) | 0.0% | 0.0% | 11.6% | 74.4% | 14.0% |

Table 46: Overall Representation

| | Poor | Substandard | Average | Good | Excellent |
|---|------|-------------|---------|-------|-----------|
| District Court Judges Responses | | | | | |
| Private Assigned Counsel (n=42) | 0.0% | 2.4% | 21.4% | 45.3% | 31.0% |
| Contract Defender (n=17) | 0.0% | 17.6% | 23.5% | 29.4% | 29.4% |
| Elected Public Defender (n=38) | 2.6% | 5.3% | 21.1% | 15.8% | 55.3% |
| Retained Counsel (n=43) | 0.0% | 2.3% | 11.6% | 58.1% | 23.2% |
| County and Juvenile Judges Responses | | | | | |
| Private Assigned Counsel (n=48) | 0.0% | 0.0% | 12.5% | 64.6% | 22.9% |
| Contract Defender (n=20) | 0.0% | 0.0% | 30.0% | 55.0% | 15.0% |
| Elected Public Defender (n=40) | 0.0% | 0.0% | 20.0% | 45.0% | 35.0% |
| Retained Counsel (n=42) | 0.0% | 0.0% | 7.1% | 76.2% | 16.7% |

County Commissioners: Satisfaction with Quality

County Commissioners were asked how satisfied they are with the quality of indigent defense in their counties. In general, the majority of County Commissioners are either *very satisfied* (15.7%) or *satisfied* (52.9%) with the quality of indigent defense in their county. Approximately one-quarter (25.5%) are *neither satisfied or dissatisfied* and 5.9% report being *dissatisfied*. None of the County Commissioners surveyed report being *very dissatisfied* with the quality of defense in their county.

Table 47: How Satisfied are You with the Quality of Defense this System Provides to your County?

| | Number | Percent |
|-----------------------------------|--------|---------|
| Very Satisfied | 8 | 15.7% |
| Satisfied | 27 | 52.9% |
| Neither Satisfied or Dissatisfied | 13 | 25.5% |
| Dissatisfied | 3 | 5.9% |
| Very Dissatisfied | 0 | 0.0% |
| Total | 51 | 100% |

How often do defense counsel request services and how often are they granted?

Judges were asked to indicate how often services are requested by the various types of defense counsel and how often services are granted. Categories of services include: investigators, eye witnesses, social services, medical/psychiatric exams, forensic/lab tests, other expert costs, depositions, transcriptions of preliminary hearings, transcriptions of trial testimony, interpreters and polygraph tests (see table 48 and 49).

The comments of one judge suggest that indigent defense systems do not have the same access to resources as county attorneys do:

Public defense should be funded on par with the prosecutors. Just as the state has unlimited access to experts the public defender should have reasonable access to experts and investigators. The public defender should not have to reveal their case ahead of time in order to obtain experts.

Apparently access to services impacts attorneys willingness to take appointments. As one attorney explains, “I rarely accept state court appointments because the fee is too low and the process for obtaining support services is unwieldy.

Table 48: Services Requested by the various Indigent Defense Systems

| | Private Assigned Counsel | | | | Contract and Elected Public Defenders | | | |
|---|--------------------------|-----------------------|----------------------|-----------------------|---------------------------------------|-----------------------|----------------------|-----------------------|
| | Not Requested | | Requested | | Not Requested | | Requested | |
| <u>District Court</u> | <u>Number</u> | <u>Percent</u> | <u>Number</u> | <u>Percent</u> | <u>Number</u> | <u>Percent</u> | <u>Number</u> | <u>Percent</u> |
| Investigators | 15 | 46.9% | 17 | 53.1% | 14 | 58.3% | 10 | 41.6% |
| Expert Witnesses | 4 | 12.5% | 28 | 87.5% | 5 | 14.3% | 30 | 85.7% |
| Social Services) | 23 | 92.0% | 2 | 8.0% | 19 | 86.4% | 3 | 13.6% |
| Medical/Psychiatric Exam | 3 | 9.1% | 30 | 90.9% | 1 | 3.2% | 30 | 96.8% |
| Forensic/Lab Tests | 10 | 32.3% | 21 | 67.7% | 9 | 36% | 16 | 64.0% |
| Other Expert Costs | 13 | 56.5% | 10 | 43.5% | 11 | 61.1% | 7 | 38.9% |
| Depositions | 1 | 3.1% | 31 | 96.9% | 2 | 6.5% | 29 | 93.5% |
| Transcriptions of Preliminary Hearings | 8 | 27.6% | 21 | 72.4% | 5 | 41.7% | 7 | 58.3% |
| Transcriptions of Trial Testimony | 7 | 24.1% | 22 | 75.9% | 9 | 32.1% | 19 | 67.9% |
| Interpreters | 2 | 6.5% | 29 | 93.5% | 8 | 22.2% | 28 | 77.8% |
| Polygraph Tests | 18 | 72.0% | 7 | 28.0% | 14 | 70% | 6 | 30.0% |
| | | | | | | | | |
| <u>County and Juvenile Court</u> | | | | | | | | |
| Investigators | 7 | 58.3% | 5 | 41.7% | 7 | 63.6% | 4 | 36.4% |
| Expert Witnesses | 4 | 36.4% | 7 | 63.6% | 3 | 30.0% | 7 | 70.0% |
| Social Services | 5 | 45.5% | 6 | 54.5% | 4 | 44.4% | 5 | 55.5% |
| Medical/Psychiatric Exam | 1 | 7.7% | 12 | 92.3% | 3 | 30.0% | 7 | 70.0% |
| Forensic/Lab Tests | 4 | 36.4% | 7 | 63.6% | 4 | 40.0% | 6 | 60.0% |
| Other Expert Costs | 4 | 36.4% | 7 | 63.6% | 4 | 40.0% | 6 | 60.0% |
| Depositions | 0 | 0.0% | 12 | 100% | 0 | 0.0% | 9 | 100% |
| Transcriptions of Preliminary Hearings | 0 | 0.0% | 16 | 100% | 0 | 0.0% | 14 | 100% |
| Transcriptions of Trial Testimony | 1 | 6.7% | 14 | 93.3% | 0 | 0.0% | 12 | 100% |
| Interpreters | 0 | 0.0% | 15 | 100% | 0 | 0.0% | 18 | 100% |
| Polygraph Tests | 7 | 77.8% | 2 | 22.2% | 6 | 75.0% | 2 | 25.0% |

Table 49: Services Granted to the various Indigent Defense Systems

| | Private Assigned Counsel | | | | Contract and Elected Public Defenders | | | |
|---|--------------------------|-----------------------|----------------------|-----------------------|---------------------------------------|-----------------------|----------------------|-----------------------|
| | Not Granted | | Granted | | Not Granted | | Granted | |
| <u>District Court</u> | <u>Number</u> | <u>Percent</u> | <u>Number</u> | <u>Percent</u> | <u>Number</u> | <u>Percent</u> | <u>Number</u> | <u>Percent</u> |
| Investigators | 8 | 33.3% | 16 | 66.7% | 6 | 35.3% | 11 | 64.7% |
| Expert Witnesses | 4 | 14.3% | 24 | 85.7% | 3 | 12.0% | 22 | 88.0% |
| Social Services) | 10 | 58.8% | 7 | 41.2% | 10 | 62.5% | 6 | 37.5% |
| Medical/Psychiatric Exam | 1 | 3.7% | 26 | 96.3% | 2 | 6.7% | 28 | 93.3% |
| Forensic/Lab Tests | 6 | 24.0% | 19 | 76.0% | 6 | 27.3% | 16 | 72.7% |
| Other Expert Costs | 8 | 47.1% | 9 | 52.9% | 8 | 53.3% | 7 | 46.7% |
| Depositions | 1 | 3.1% | 31 | 96.9% | 1 | 3.2% | 30 | 96.7% |
| Transcriptions of Preliminary Hearings | 5 | 18.5% | 22 | 81.5% | 3 | 11.1% | 24 | 88.9% |
| Transcriptions of Trial Testimony | 4 | 14.8% | 23 | 85.2% | 5 | 20.0% | 20 | 80.0% |
| Interpreters | 2 | 6.7% | 28 | 93.3% | 2 | 6.7% | 28 | 93.3% |
| Polygraph Tests | 9 | 50.0% | 9 | 50.0% | 10 | 58.8% | 7 | 41.2% |
| | | | | | | | | |
| <u>County and Juvenile Court</u> | | | | | | | | |
| Investigators | 4 | 44.4% | 5 | 55.6% | 3 | 50.0% | 3 | 50.0% |
| Expert Witnesses | 2 | 22.2% | 7 | 77.8% | 0 | 0.0% | 6 | 100% |
| Social Services | 4 | 44.4% | 5 | 55.6% | 3 | 42.9% | 4 | 57.1% |
| Medical/Psychiatric Exam | 1 | 8.3% | 11 | 91.7% | 0 | 0.0% | 8 | 100% |
| Forensic/Lab Tests | 3 | 30.0% | 7 | 70.0% | 2 | 28.6% | 5 | 71.4% |
| Other Expert Costs | 3 | 30.0% | 7 | 70.0% | 2 | 28.6% | 5 | 71.4% |
| Depositions | 0 | 0.0% | 11 | 100.0% | 0 | 0.0% | 9 | 100% |
| Transcriptions of Preliminary Hearings | 0 | 0.0% | 16 | 100.0% | 0 | 0.0% | 17 | 100% |
| Transcriptions of Trial Testimony | 1 | 6.7% | 14 | 93.3% | 0 | 0.0% | 12 | 100% |
| Interpreters | 0 | 0.0% | 15 | 100.0% | 0 | 0.0% | 17 | 100% |
| Polygraph Tests | 5 | 71.4% | 2 | 28.6% | 3 | 60.0% | 2 | 40.0% |

Do you seek and do judges allow ex parte hearings, when considering motions for investigators, experts and other additional assistance?

Attorneys were asked if they seek and if judges allow ex parte hearings when considering motions for investigations, experts and other additional assistance. Twenty-seven point eight percent (27.8%) of responding attorneys indicate that they do and 72.1% indicate that they do not.

Table 50: Do you Seek and do Judges Allow Ex Parte Hearings, when Considering Motions for Investigators, Experts and other Additional Assistance?

| | Number | Percent |
|-------|--------|---------|
| Yes | 39 | 27.8% |
| No | 101 | 72.1% |
| Total | 140 | 100% |

Over one-fifth (21.1%) of attorneys indicate that it has been their experience that ex parte hearings are allowed by *all judges*. Twenty-nine point eight percent (29.8%) indicate that ex parte hearings are allowed by most judges and 17.5% indicate that they are allowed by a *few judges*. Nearly one-third (31.6%) of attorneys indicate that it has been their experience that *no judges* allow exparte hearings.

Table 51: Exparte Hearings are Allowed by:

| | Number | Percent |
|-------------|--------|---------|
| All judges | 12 | 21.1% |
| Most Judges | 17 | 29.8% |
| Few Judges | 5.6 | 17.5% |
| No Judges | 18 | 31.6% |
| Total | 57 | 100% |

VII. OVERALL EXPENDITURES

County Commissioners were asked to provide figures on the total spent on indigent defense in 2004 (see Table 52). For the 52 counties reporting, the total spent on indigent defense in 2004 was \$11,259,573.

Table 52: Indigent Defense Expenditures in 2004 by County

| County | Type of System | Population | Total Spent (2004) |
|--------------------|----------------|------------|--------------------|
| Adams | EPD | 31,151 | \$459,130 |
| Antelope | CPD | 7,452 | \$59,941 |
| Boone | CPD | 6,259 | \$32,000 |
| Burt | AC | 7,791 | \$86,000 |
| Butler | CPD | 8,767 | \$83,746 |
| Cedar | AC | 9,615 | \$80,572 |
| Cherry | AC | 6,148 | \$82,957 |
| Cheyenne | AC | 9,830 | \$214,354 |
| Colfax | CPD | 10,441 | \$112,261 |
| Cuming | AC | 10,203 | \$33,823 |
| Custer | CPD | 11,793 | \$56,639 |
| Dakota | EPD | 20,253 | \$274,168 |
| Dawes | EPD | 9,060 | \$24,155 |
| Dixon | AC | 6,339 | \$39,077 |
| Dodge | AC | 36,160 | \$332,896 |
| Frontier | AC | 3,099 | \$14,876 |
| Gage | CPD | 22,993 | \$38,561 |
| Gosper | AC | 2,143 | \$21,111 |
| Hall | EPD | 53,534 | \$839,553 |
| Hamilton | AC | 9,403 | \$125,000 |
| Harlan | AC | 3,786 | \$36,423 |
| Hitchcock | CPD | 3,111 | \$25,829 |
| Jefferson | CPD | 8,333 | \$75,733 |
| Kearney | EPD | 6,882 | \$57,372 |
| Keith ¹ | CPD | 8,875 | \$113,063 |
| Keya Paha | AC | 983 | \$612 |
| Kimball | AC | 4,089 | \$106,973 |
| Knox | CPD | 9,374 | \$136,000 |
| Lancaster | EPD | 250,291 | \$4,077,059 |
| Lincoln | EPD | 34,632 | \$346,485 |
| Loup | AC | 712 | \$4,920 |
| Madison | EPD | 533 | \$862,577 |
| McPherson | AC | 35,226 | \$5,944 |
| Merrick | AC | 8,204 | \$97,000 |
| Nance | AC | 4,038 | \$84,275 |
| Nuckolls | AC | 5,057 | \$48,933 |
| Otoe | EPD | 15,396 | \$159,190 |
| Phelps | EPD | 9,747 | \$181,380 |
| Pierce | CPD | 7,857 | \$39,575 |
| Red Willow | CPD | 11,448 | \$92,601 |
| Richardson | CPD | 9,531 | \$77,369 |

| County | Type of System | Population | Total Spent (2004) |
|--------------|----------------|------------|-----------------------|
| Rock | AC | 1,756 | \$10,409 |
| Saline | CPD | 13,843 | \$298,900 |
| Saunders | EPD | 19,830 | \$101,824 |
| Scotts Bluff | EPD | 36,951 | \$59,804 ² |
| Seward | EPD | 16,496 | \$221,605 |
| Sherman | AC | 3,318 | \$28,436 |
| Stanton | AC | 6,455 | \$51,743 |
| Thayer | CPD | 6,055 | \$21,000 |
| Valley | AC | 4,647 | \$88,417 |
| Webster | AC | 4,061 | \$27,034 |
| York | EPD | 14,598 | \$172,030 |

1 Costs for Keith County are skewed for 2004 due to a murder trial.

2 Scotts Bluff figures are from 2001-2002.

Several counties were able to provide a breakdown of how much was spent on felonies, misdemeanors and juvenile cases in 2004 (see Table 53).

Table 53: Breakdown of Indigent Defense Expenditures by County

| County | Type of System | Total Spent (2004) | Felonies | Misdemeanors | Juvenile |
|------------------------|----------------|--------------------|-------------|--------------|-------------|
| Boone | CPD | \$32,000 | \$5,904 | \$21,888 | \$4,208 |
| Cuming | AC | \$33,823 | \$5,622 | \$22,846 | \$5,622 |
| Dixon | AC | \$39,077 | \$13,677 | \$12,453 | \$12,947 |
| Dodge | AC | \$332,896 | \$98,607 | \$67,434 | \$166,856 |
| Gage | CPD | \$38,561 | \$6,500 | \$9,355 | \$22,707 |
| Gosper | AC | \$21,111 | \$14,241 | \$4,828 | \$2,042 |
| Hamilton | AC | \$125,000 | \$48,000 | \$30,400 | \$18,500 |
| Keya Paha | AC | \$612 | \$0 | \$0 | \$612 |
| Kimball | AC | \$106,973 | \$79,506 | | \$27,467 |
| Knox ¹ | CPD | \$136,000 | \$5,300 | \$0 | \$5,800 |
| Lancaster | EPD | \$4,077,059 | \$1,873,607 | \$651,620 | \$1,551,832 |
| McPherson ² | AC | \$5,944 | \$5,944 | \$0 | \$0 |
| Nance | AC | \$84,275 | \$40,036 | \$35,174 | \$9,065 |
| Otoe | EPD | \$159,190 | \$132,126 | | \$27,065 |
| Red Willow | CPD | \$92,601 | \$15,727 | \$35,555 | \$43,319 |
| Saunders | EPD | \$101,824 | \$38,325 | \$19,098 | . |

1 Total includes public defender contract

2 Because of one big felony case

County Commissioners: How satisfied are you with the current funding system for indigent defense in your county?

County Commissioners were asked to indicate how satisfied they are with the current funding system for indigent defense in their county. Nineteen point two percent (19.2%) report that they are *very satisfied* and 40.4% report that they are *satisfied*. Twenty-three point one (23.1%) report that they are *neither satisfied or dissatisfied* and 17.3% report that they are *dissatisfied*. No County Commissioners report being *very dissatisfied*.

Table 54: How Satisfied are you with the Current Funding System for Indigent Defense?

| | Number | Percent |
|-----------------------------------|--------|---------|
| Very Satisfied | 10 | 19.2% |
| Satisfied | 21 | 40.4% |
| Neither Satisfied or Dissatisfied | 12 | 23.1% |
| Dissatisfied | 9 | 17.3% |
| Very Dissatisfied | 0 | 0.0% |
| Total | 52 | 100% |

Should the state contribute to the cost of indigent defense?

County Commissioners were asked whether they thought that the state should contribute to counties' cost of indigent defense. Seventy-five point five (75.5%) of County Commissioners believe that the state should contribute. Six point one (6.1%) believe that the state should not contribute and 18.4% are unsure (see Table 55).

Table 55: Do you think that the State Should Contribute to Counties' Cost of Indigent Defense?

| | Number | Percent |
|--------|--------|---------|
| Yes | 37 | 75.5% |
| No | 3 | 6.1% |
| Unsure | 9 | 15.8% |
| Total | 49 | 100% |

As one County Commissioner explains, "Because the state has such a significant impact on the costs of indigent defense (e.g. creating new crimes, increasing penalties, adding additional Child Protection Service Workers thereby increasing juvenile filings) we believe that the state should become a partner with the counties in indigent defense."

If yes, at what percentage do you believe the state should be contributing?

County Commissioners that responded that they believe that the state should contribute to counties' cost of indigent defense were asked to identify at what percentage they believe the state should contribute. Nearly one-fourth (23.1%) believe the state should contribute between 76%-100% and nearly another quarter (23.1%) believe the state should contribute between 51%-75%. Nearly half (46.3%) believe the state should contribute between 26%-50% and only 4.9% believe the state should contribute between 0%-25%.

Table 56: If Yes, at What Percentage do you Believe the State Should be Contributing to the Cost of Indigent Defense?

| | Number | Percent |
|----------|--------|---------|
| 76%-100% | 9 | 23.1% |
| 51-75% | 9 | 23.1% |
| 26-50% | 19 | 48.7% |
| 0-25% | 2 | 5.1% |
| Total | 39 | 100% |

District-Wide Indigent Defense Systems

County Commissioners were asked their thoughts on the possibility of counties establishing a district-wide indigent defense system whereby counties would all contribute to the funding of the system. Commissioners were divided on the issue. Approximately half were in support of exploring the idea. For some counties, inter-local agreements are already in place in other respects and appear to be working efficiently and are cost effective. Those opposed to the option listed a loss of local control and the fear that smaller counties would have to increase their expenditures to meet the burden of the busier courts in the district. In general, the comments provided by Commissioners imply that if a district wide system was adopted, that a flat rate would not be ideal, rather each county's contribution should be based on size, or population, number of prosecutions or a combination of different variables. Several Commissioners believed that the even if a district wide public defender system were adopted that the state should be required to contribute to the cost of indigent defense.

ADDITIONAL ISSUES

Judges and attorneys were asked to specify any other improvements that they feel are necessary in the delivery of indigent defense in their judicial district and in the state of Nebraska as a whole. The following issues were identified (presented below verbatim):

District Court Judges

1. Contract public defenders are often only interested in closing/pleading cases ASAP and they should have maximum case loads.
2. Continuing Legal Education (CLE) in indigent criminal defense would be helpful.
3. Public defender caseloads are too high. We need more public defenders.
4. County attorneys should have no say about whether defense counsel hires services. County attorneys should have no say about how much defense counsel is paid. I believe it is time for a public defender office that is well funded.
5. Part-time public defenders often devote time to private practice and not to public defender clients.
6. Do away with the Nebraska Commission on Public Advocacy who tend to unduly complicate, obfuscate and waste the courts time and the public's money.
7. There is a need for more attorneys to become proficient in criminal law.
8. The lack of courtroom security has been a concern for defense attorneys. They often deal with angry clients who take out their anger on their own counsel.
9. The public defender system seems to be pulling more appointments on their money contracts and not enough on clients' cases. Because of contracts the public defenders seem to do less work than required. They want to plea bargain quickly in the small counties. I hear it is different in larger counties.
10. We have an elected public defender whose budget is controlled by political reach [this] taxes the ability of the public defender along with other considerations, to devote time to each individual case. Because of personality conflicts between offices of elected officials many times client services may suffer.
11. A state-wide public defender program is needed.
12. The Nebraska Commission on Public Advocacy has helped immensely. The state could set standards for appointment, standards for qualifications, standards for keeping of a written list. However, standards for honesty in billing and truthfulness about skill are almost impossible
13. Larger public defender offices, maybe on a district-wide basis.

County and Juvenile Court Judges

1. I have heard that there is a lot of pressure by county boards in smaller counties not to appoint counsel for juveniles due to the cost, and that juveniles are often not fully advised of their right to appointed counsel at no cost to them if they are unable to afford counsel.
2. The offer of pro bono work by lay members (which is occurring through NSBA's One Hour of Sharing Program) should be extended and utilized in juvenile court cases.
3. There needs to be a better system or form with guidelines for determining indigency.

4. I think a system of determining indigency by an entity other than the judge hearing the case would be very helpful and result in less discrepancy between courts in appointing counsel.
5. Increased training for court appointed counsel at free or reduced cost.

Attorneys Accepting Appointments

Attorneys who accept court appointments in felony and misdemeanor cases were asked to specify any other improvements that they feel are necessary in the delivery of indigent defense in their courts and in the state of Nebraska as a whole. The following issues were identified (presented below verbatim):

1. Public defenders (contracted by county) seem unwilling to try cases. Too many plea agreements.
2. There should be a more uniform method of determining indigency.

Preliminary Findings

Chapter 1: Indigent Defense Systems in Nebraska

1. Over the past decade counties have been moving to contract defender programs and to a lesser extent elected public defender programs and away from assigned counsel programs.
2. Data indicate that juvenile abuse/neglect cases are substantially more likely to receive court appointed counsel than are juvenile law violations or status offenses.

Chapter 2: System of Assigning Counsel

1. Because county and juvenile court judges are significantly more likely to make court appointments than are district court judges, county and juvenile courts are significantly more likely to maintain lists of attorneys willing to be assigned to indigent defendants than are District Courts.
2. Over one-third of counties do not maintain rosters of eligible attorneys.
3. Over one-tenth of the attorneys listed on judges' court appointment lists were either deceased or disbarred.
4. Of the counties that maintain lists of attorneys, these lists are compiled via different methods.
5. No uniform process for adding or removing attorneys from the list exists.
6. It appears that there is a disconnect between who county and district court judges deem qualified. Nearly 60% of district court judges have removed an attorney who was appointed by the county court and replaced that attorney with a new attorney in district court.
7. A substantial number of attorneys believe that the assignment process is subjective, based on judges personal preferences.
8. A substantial number of attorneys indicate that they do not know how judges make appointments (i.e. rotation, case type, etc.).
9. The perception exists among attorneys that newer lawyers get the majority of appointments notwithstanding the severity of the case.
10. The majority of Nebraska judges use a combination of rotation, case type and experience as the basis for court appointments.
11. Some counties require that the attorney be physically present in the courtroom to be considered for appointment.
12. Aside from membership in the Nebraska State Bar Association there are no formal qualifications for attorneys representing indigent defendants.
13. In some counties, court appointments are made by clerk magistrates rather than judges (in some instances with the assistance of a list, in others no list is reportedly used).
14. No "formal" provisions exist for ensuring the quality of representation by attorneys appointed to indigent clients.
15. No "formal" provisions exist for selecting attorneys to handle more complex, serious, or special cases.

16. A majority of district court judges have removed an attorney appointed in the county court and replaced that attorney with a new attorney in district court.
17. While many issues and recommendations for improvement were made, judges and attorneys are, in general, satisfied with the system of assigning counsel.

Chapter 3: Fee Structure

1. Currently one county differentiates between in-court and out-of-court rates in district court.
2. Currently one county accepts attorneys' normal hourly rates in district court.
3. There is no uniformity in fees across the state. The difference (range) in rates in capital cases is \$40, in felony cases \$20, and in misdemeanor and juvenile cases the difference in rates is up to \$40.
4. The majority of counties pay below the Nebraska Commission on Public Advocacy Indigent Defense Standards Advisory Council's recommended rate in capital cases.
5. The majority of counties pay below the Nebraska Commission on Public Advocacy Indigent Defense Standards Advisory Council's recommended rate in serious felony cases.
6. The hourly rates across counties do not differentiate between misdemeanor, juvenile law violations, status cases and abuse neglect cases.
7. A substantial percentage of judges and the majority of attorneys believe the current rates are too low.
8. In district court hourly rates are primarily set by a consensus of the district court judges.
9. In many counties, fees are not periodically reviewed and have not been increased for more than a decade.
10. The concern with fees has in some cases undermined the system (judges forcing settlement, or appointing lawyers who are unlikely to go to trial, prosecutors who do not file charges and law enforcement officers not making arrests).
11. Low fees have reportedly discouraged quality counsel from accepting court appointments.
12. Age appears to be a factor in considering whether or not to make/take appointments, many new attorneys accept court appointments as a way to build experience while several older attorneys believe that at some point, they have served their ethical obligation to take court appointments.
13. Only two counties pay their county attorneys and public defenders on an equal basis.
14. In a majority of counties the county attorney salary exceeds that of the public defender salary.
15. Most jurisdictions do not have policies on what expenses will be reimbursed and which will not.

Chapter 4: Compensation Procedures

1. On occasion attorneys are either required or volunteer to accept court appointments without compensation.
2. Although all judges require a detailed statement from the attorney on how they spent time on the case, the party who reviews the statement differs by county and by court (district, county or juvenile).
3. Bills are reduced by judges.
4. While judges report reducing bills for various legitimate reasons, some attorneys perceive that reductions are arbitrary or based on county budget concerns.
5. Many courts require the case to be completed before attorneys can submit payment claims.
6. The budget from which assigned counsel fees are paid from depends on the county.
7. Overall, judges are satisfied with the system of compensating counsel used in their jurisdiction. Attorneys are significantly less satisfied with the system.
8. In some instances county attorneys review attorneys claims for fees.
9. In some counties, bill applications are set for hearing.
10. County boards do not always approve bills in a timely manner.

Chapter 5: Capital Case Appointments

1. A second attorney is not always appointed in a capital case.
2. There are no “formal” qualifications for appointment to a capital case.
3. Several attorneys have had difficulty with securing payment for their work representing indigent defendants in capital cases.
4. Thirty percent of attorneys who have accepted capital cases report that they did not feel sufficiently knowledgeable to represent their client.
5. Seventy percent of those who have accepted capital cases in the past would be willing to be appointed to another capital case. Of attorneys who have never tried a capital case, 42% indicate that they would be willing to accept the appointment.
6. Attorneys believe that some form of training to represent defendants in capital cases should be available.

Chapter 6: Quality of Representation

1. Appointments primarily occur prior to or at arraignment.
2. Data indicate that appointments typically occur sooner in juvenile case than in felony or misdemeanor cases.
3. Appointments are made sooner in felony cases than in misdemeanor cases.
4. In general, the majority of County Commissioners are either very satisfied or satisfied with the quality of indigent defense in their county.
5. Indigent defense systems do not have the same access to resources as county attorneys do.
6. A majority of responding attorneys do not seek ex parte hearings when considering motions for investigations, experts and other additional assistance.

Chapter 7: Overall Expenditures

1. A majority of County Commissioners are satisfied with the current funding system for indigent defense in their county.
2. Three-quarters of County Commissioners believe that the state should contribute to the cost of indigent defense.
3. Nearly half of County Commissioners surveyed believe the state should contribute between 26-50% of the cost of indigent defense.
4. Nearly half of County Commissioners surveyed supported exploring the idea of district-wide indigent defense systems.